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ABSTRACT

This document contains the conference papers of the Education Law Association's 2000 conference. The papers examine school prayer; student speech under the Equal Access Act; the control of student behavior and expression; legal challenges facing the charter-school movement, the future of special-education law, school desegregation decrees, and charter-school innovation; collegiality and tenure; the use of statistics in discrimination cases; the electronic media and school violence; freedom of expression outside the classroom; developments in church/state/school relations; higher education and affirmative action; vouchers; student-led prayer in school; the Milwaukee parental-choice program; practical tips in representing school clients; a framework for addressing school test-use issues; providing services to the youngest children with disabilities; student handbooks; legal issues in teacher evaluation and remediation; Title VII and the First Amendment; litigation and the future of functional behavioral assessment; the Wall of Separation Doctrine in the Rehnquist era; do-not-resuscitate orders and school responsibility; legal issues evolving from the use of evaluations in teacher-employment termination; the Internet and legal issues; confidentiality of records in K-12 schools; Blackstone and the Americans with Disabilities Act; religion, schools, and legal issues; and emerging issues in special-education law. (RJM)

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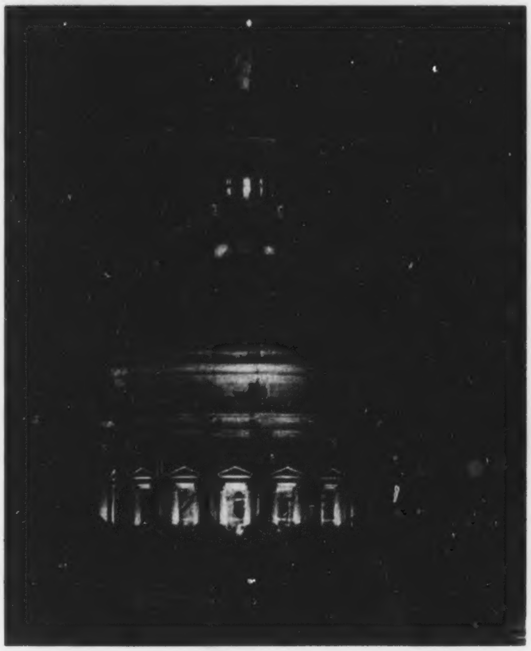
Legal Issues in Education Practice: Challenges and Opportunities in the 21st Century



2000 Conference Papers

Education Law Association
46th Annual Conference
November 9-11, 2000
Atlanta, Georgia

ED 451 610

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LEGAL ISSUES IN EDUCATION PRACTICE: *CHALLENGES AND OPPORTUNITIES IN THE 21ST CENTURY*

2000 CONFERENCE PAPERS
TOPIC OUTLINES

EDUCATION LAW ASSOCIATION
46TH ANNUAL CONFERENCE
NOVEMBER 9 – 11, 2000
ATLANTA, GEORGIA

EDUCATION LAW ASSOCIATION
46TH ANNUAL CONFERENCE
NOVEMBER 8-11, 2000
ATLANTA, GEORGIA

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THEY HAVEN'T GOT A PRAYER: HOW FAITH & DEVOTION REMAIN ON THE OTHER SIDE OF THE SCHOOLHOUSE WALL

Santa Fe v. *Doe*: *Court Outlaws School-Supported Student-Led Prayer at Sports Events*

Presented By:

David Schimmel
University of Massachusetts Amherst

46th Annual Education Law Association Conference
November 9-11, 2000
Atlanta, Georgia

They Haven't Got A Prayer: How Faith & Devotion Remain On the Other Side of the Schoolhouse Wall

Santa Fe v. Doe:

Court Outlaws School-Sponsored Student-Led Prayers at Sports Events

By David Schimmel
University of Massachusetts Amherst

In *Santa Fe v. Doe*, 120 S.Ct. 2266 (2000), the U.S. Supreme Court ruled that school-sponsored, student-led prayer at football games violated the Establishment Clause. The case evolved from two Texas school district policies: one allowed the Santa Fe High School students to vote on whether invocations should be part of graduation ceremonies, and if so, to select the student to deliver them. The second policy allowed students to vote on the same prayer issues for football games. The Fifth Circuit Court of Appeals held that student-led prayers were permissible at "once-in-a-lifetime" graduation ceremonies, but not at sporting events which are "far less solemn and extraordinary."

When this case was appealed to the Supreme Court, it gave the Justices the opportunity to clarify the constitutionality of student-led prayer at both graduations and sports events. Despite the fact that the Circuit courts are split on the issue of graduation prayers, the High Court decided only to rule on prayers at football games. Nevertheless, the opinion and principles of *Santa Fe* seem relevant to graduation as well.

The Justices' Opinions. In a 6-to-3 opinion by Justice Stevens, the Court rejects the argument that the Santa Fe student-led prayers are not government endorsed speech, but are private student messages that should be protected under the Free Speech and Free Exercise Clauses. The Court ruled that the Santa Fe policy does not create a limited public forum, and the election process is not viewpoint neutral. Instead, it guarantees that "minority candidates will never prevail and that their views will be effectively silenced."

The Court uses all three Establishment Clause tests – the Lemon, the "endorsement," and the "coercion" test – to strike down the Santa Fe policy: First, the school argued that the policy had the legitimate secular purpose of solemnizing sporting events and promoting student free expression. Applying *Lemon*, the majority writes that courts have a duty "to distinguish a sham secular purpose from a sincere one." Since the school policy allowed only one student to give a content-limited message, it did not promote free expression. Furthermore, the use of prayer to foster solemnity is not permissible when "it constitutes prayer sponsored by the school." In addition, the history and context of this policy – originating in the office of "Student Chaplain" and the "Prayer at Football Games" policy – indicate that the real purpose of the challenged policy was not secular. Rather, it was designed to preserve the school's traditional religious invocation.

Second, the Court uses Justice O'Connor's test, which asks whether an objective observer would perceive the policy and its implementation "as a state endorsement of prayer in the public schools." Applying that test, the Court concludes that an objective Santa Fe student "will unquestionably perceive the inevitable pre-game prayer as stamped with her school's seal of approval."

Third, the Court uses Justice Kennedy's coercion test. The district had argued that their policy involved no coercion since football games are extra-curricular and attendance is voluntary. In response, Justice Stevens points out that some students such as team and band members and cheerleaders are required to be present, that many other high school students feel immense social pressure to attend, and a pre-game prayer "has the improper effect of coercing those present to participate in an act of religious worship."

Santa Fe's final argument was that the court challenge was premature since the policy was facially valid and the student's pre-game message might not be religious. However, the Court rules that even if no Santa Fe student were to offer a prayer, the policy itself is unconstitutional because it encourages a religious message. "Government efforts to endorse religion," writes Stevens, "cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail."

A dissenting opinion by the Chief Justice was joined by Justices Thomas and Scalia. The dissent argues that any student pre-game message would be private, not government speech "since the student not the government would choose what to say." In addition, Rehnquist writes that the Court should give deference to the policy's "plausible secular purpose" since it is possible to solemnize a sports event through a non-religious message. While Rehnquist acknowledges that the Santa Fe policy might be applied unconstitutionally, he concludes that "it will be time enough to invalidate it if that is found to be the case."

Implications. *Santa Fe* might be viewed as a narrow decision that is limited to prayers at high school football games. But what is significant about *Santa Fe* is that the Court's opinion, joined by six justices, rejects a series of arguments and strategies that have been used in recent years to justify student-led prayer at a variety of school-sponsored events. Concerning these arguments and strategies, the Court ruled that:

1. A school-run student election to decide on whether to offer a prayer does not disentangle the school from the religious message. On the contrary, an election "that subjects the issue of prayer to majority vote" is unconstitutional.
2. Even if administrators do not dictate the student's message, the open forum, free speech rationale may not protect a student prayer policy. This is especially true when only one student is elected by the majority to give a restricted message and minority views are silenced.
3. Even if a school's pre-game message policy is facially neutral and doesn't use words such as "prayer" or "invocation," the policy will violate the Establishment Clause if an objective observer would perceive it as a school endorsement of religion.
4. Even if a school policy professes a legitimate secular purpose, courts will reject the stated purpose if they find it to be a "sham." And even if a challenged policy has not been implemented, courts should apply the secular purpose test in light of the district's past practices to determine if its true purpose is to promote religion.
5. Even if attendance at a school event is voluntary, student-led prayer may fail the coercion test if there is "immense social pressure" to attend the event and participate in the prayers.

Unanswered Questions. In *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), the Fifth Circuit upheld a school policy permitting student-led graduation prayer that was approved by a vote of the students. In *Santa Fe*, the Court declined to rule on the issue of graduation prayer and accepted certiorari only on the question of prayer at football games. As a result, it is unclear whether *Clear Creek* is still good law.

Some commentators argue that student-led graduation prayer is still permitted for two reasons. First, the Court declined to consider the issue and did not discuss *Clear Creek*. Second, the Court quoted (without approval or rejection) the Fifth Circuit's distinction between graduation ceremonies and sports: graduation is a once-in-a-lifetime event and athletic activities are frequent and "far less solemn."

However, I believe a stronger argument can be made that the principles of Santa Fe and the specific features rejected by the Court in that case implicitly overrule the kind of student-led graduation prayer policies featured in *Clear Creek*. Specifically, *Santa Fe* condemns: (1) the use of student elections to decide about prayers at school events, (2) administrative supervision of the election, (3) a school policy that allows voting on an invocation or any other religious message or activity, (4) the notion that an invocation to solemnize a school-sponsored activity is a legitimate secular purpose, and (5) the argument that student-led prayer is protected under the Free Speech and Free Exercise Clauses.

In short, *Santa Fe* gives us clear guidance concerning school-sponsored, student-led prayer at school athletic events. However, in *Santa Fe*, the Supreme Court abdicates its responsibility to provide guidance on graduation prayers and fails to establish a "uniform law of the land" on an issue that divides the courts and the country. Nevertheless, since most of the principles discussed in *Santa Fe* apply equally to graduation prayers, cautious lawyers and administrators should be hesitant to approve student-led prayers at any school-sponsored activity that violates those principles.

Comment. In his dissent, the Chief Justice condemns the majority opinion alleging that "it bristles with hostility to all things religious in public life." This inflammatory attack has been echoed and amplified in many states by students, parents, and radio broadcasters who believe that an anti-religious Court has outlawed all student prayer at football games and that a religious rebellion should be organized against such ungodly judicial decrees. It is unfortunate that the majority opinion devotes so little effort to countering Rehnquist's attack, to highlighting Santa Fe's deplorable discrimination against children of religious minorities, and to explaining how the Court's ruling tries to protect freedom for all religions.

Certainly reasonable lawyers and judges can disagree about when student prayer crosses the constitutional line and becomes government sponsored. Still, one might hope that all Education Law Association members (those who disagree with *Santa Fe* as well as its supporters) might teach their constituents that the "Texas football decision" does not prohibit all student prayer, but only school-sponsored prayer, and help them understand the difference.

PRAYER FALLS ON HARD TIMES

By Edwin C. Darden
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Because the landscape of prayer and public schools is so cloudy, creative faithkeepers have turned to prayer proxies instead.

Ideas like posting the Ten Commandments on the wall as an historical document, placing them on book covers, pausing for a moment of silence, putting the national motto "In God We Trust" in a prominent place[1] and initiating "spontaneous" student prayer led by believing adults have all prospered since the *Santa Fe* case was decided.

One of the bolder attempts is unfolding in Virginia even as this is being written. In late July 2000, a federal judge for the U.S. District Court for the Eastern District of Virginia declined to issue an injunction stopping all public schools from requiring students to observe a moment of silence. The American Civil Liberties Union challenged the law, which took effect July 1, arguing that it was in essence inserting religion into the public school environment and therefore violates the Establishment Clause of the First Amendment. The law suggests that students can meditate, pray or engage in any other silent activity. U.S. District Court Judge Claude Hilton concluded, "There's nothing to fear from a classroom of silent, thoughtful children."

An argument could be made, however, that the cues surrounding a moment of silence all signal that it is a time to pray. The fact that it lasts for one minute, that the most common use of a moment of silence is to offer prayers for a recently deceased person, the fact that the moment is conducted enmasse by a leader who commences and ends the silence, the historic use of silence as a prayer device and as a

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[1] On July 6, 2000, the Colorado State Board of Education voted 5-1 in a non-binding resolution to encourage schools to display the national motto "In God We Trust."

worship technique among people in the Shaker religion, along with other cues give both young and more mature students the message that prayer is expected, if not demanded. Proponents say that the Virginia law merely points out that prayer is one of the students' options, but that the state is not encouraging prayer.

Louisiana was the site of a setback for prayer advocates. On June 14, 2000, U.S. District Court Judge Robert G. James ruled that a 1999 Louisiana state law that permitted students to pray out loud was unconstitutional. The Louisiana legislature, saying that it wanted to revive spoken prayer by teachers and students, amended the "silent prayer or meditation" statute by removing the word "silent." The challenge, brought by Americans United for Separation of Church & State and the American Civil Liberties Union brought some unequivocal language from the judge. "This statute cannot help but create the appearance that the state of Louisiana is endorsing religion since the state has created a venue for public prayer (the quintessential religious practice) in public facilities under the supervision of public officials. The Court therefore finds that the statute is an unconstitutional endorsement of religion," said James in *Doe v. Ouachita Parish School Board* (unpublished), *Federal Court Strikes Down Louisiana School Prayer Law*, CHURCH & STATE, July/August 2000, at 21.

The state of Louisiana was also the center of attention that same month for a school board's policy requiring teachers to read a disclaimer before teaching about the science of evolution. The U.S. Supreme Court on June 19, 2000 refused, 6-3, to review the 5th U.S. Circuit Court of Appeals' ruling in the case, which found that the practice violated the Establishment Clause. The Tangipahoa Parish school board had mandated that teachers inform their charges that the theory of evolution is "presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept." *Tangipahoa Parish Board of Education v. Freiler*, 99-1625, 185 F.3d 33, (5th Cir. 1999), 201 F.3d 602 (5th Cir. Jan. 24, 2000), *petition for rehearing en banc denied*. A district court judge said the policy was unconstitutional because it had a religious purpose, while the 5th Circuit agreed for a different reason – that it had the effect of promoting religion. The circuit court said a more neutral disclaimer that simply said that evolution is not the only explanation for the origin of life might be acceptable, but that the Tangipahoa rendition crossed the line.

On June 26, 2000 in what might be as close to a hint as the U.S. Supreme Court gets, the case of *Chandler v. Siegelman*, No. 99-935, 180 F.3d 1254 (11th Cir. 1999), was vacated and remanded to the district court for consideration in light of *Santa Fe v. Doe*. *Chandler* involves an Alabama statute that permits students to deliver a voluntary prayer at any school-sponsored event. The 11th Circuit had lifted a district court-imposed injunction, saying that if the lower court squelches truly voluntary student prayer, then it would be exhibiting a hostility toward religion. Now, the matter is back in the hands of the district court.

In an intriguing development, however, the Supreme Court has not similarly disposed of a prayer at graduation case from Florida. The issue in *Adler v. Duval County Florida School Board*, No. 99-1870, 174 F.3d 1236 (11th Cir. 1999), 206 F.3d 1070 (11th Cir. 2000), *rehearing en banc*, revolves around the question of voluntary student prayer, a question that went unsettled in either *Lee v. Weissman*, 505 U.S. 597, 112 S.Ct. 2649 (1992) or *Santa Fe*. In a striking similarity to *Santa Fe*, the Duval County policy allows students to vote on which student will deliver an unrestricted messages at graduation – allowing the student to choose to deliver a prayer if she or he so deems. At the rehearing *en banc*, the 11th U.S. Circuit Court of Appeals reversed its panel and found that the practice did not violate the Establishment Clause. So the case remains on the High Court's docket awaiting action.

Similarly, prayer was driven from the Cleveland Board of Education board room in 1999 in *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999), 183 F.3d 538 (6th Cir. June 11, 1999), *petition for rehearing en banc denied*. The case involved a challenge by a former student and teacher against the board's practice of opening its meetings with prayer or a moment of silence. The appeals court agreed that the practice was a violation of the Establishment Clause. The court reasoned that the board meetings were an integral part of the public school system, were conducted on school property by school officials, were attended by students who participated in discussions, were compulsory for students wishing to challenge disciplinary action and that the prayers went beyond solemnizing the meeting to endorsing religion. The court made clear that the school board prayer was different from the chaplain's prayer delivered at the beginning of Nebraska state legislative sessions, which the Supreme Court upheld in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 330, 77 L.Ed.2d 1019 (1983).

Graciously, Judge Ronald Lee Gilman of the 6th Circuit explained the 2-1 decision, saying it did not mean that religion must be kept entirely out of the public school system. "Certainly students might themselves wish to pray during the time they spend at school. It is only when the government, through its school officials, chooses to introduce and exhort religion in the school system that Establishment Clause concerns take shape," Gilman wrote.

In the Beaumont Independent School District in Texas, school officials took a novel approach in creating the "Clergy in Schools" volunteer counseling program that permitted ordained religious leaders to counsel students on a day-to-day basis during school hours. The United States District Court for the Eastern District of Texas found in *Doe v. Beaumont Independent School District*, 97-40429 (E.D. Tex. April 16, 1999), that the practice violates the First Amendment's Establishment Clause. The Superintendent who initiated the program said the restriction to clergy was designed to take advantage of the clergy's special listening and communication skills. The school district did take precautions, however, advising clergy in their guidelines not to discuss religion, quote religious materials, provide information about church services, identify their church affiliation or wear distinctive garb that would reveal their religious affiliation. Also, the Beaumont district instructed clergy that they were not to offer to pray with students and that any student who asked for prayer should be encouraged to share that need with a parent or with her or his individual clergyman outside school. Undergoing a lengthy analysis, the court found, *inter alia*, that the program failed the first prong of the *Lemon* test because it does not have a secular purpose, and indeed its intent is to advance religion among public school students. The court also found that there was a coercive effect to the program and that constitutes an unacceptable endorsement of religion.

Taken as a whole, I would submit that this constitutes a pattern in the federal judiciary. Since the early 1990s it has been the favorite sport of scholars, journalists, pundits and lawyers to decry the drift to the right side of the political spectrum. The blame has sometimes misleadingly been placed on the conservative nature of Ronald Reagan-appointed judges who are perceived as chipping away at the First Amendment's historic two-part tension, and the prohibition of close ties between church and state.

Yet, while it remains true that Supreme Court and lower federal court judges have been more willing to allow a cozy relationship between schools and religion in general (*e.g. Mitchell v. Helms*, 69 USLW 3156, No. 98-1648 (2000), which permits computers and other technology equipment to flow to private schools, including religious schools and implies that vouchers cannot be far behind), the district court judges, appeals court panels and even the U.S. Supreme Court itself through the denial of *cert.* has generally held the line on prayer.

Thus, contrary to popular opinion, the conservative federal judiciary draws a line in the sand at outright prayer (particularly when it seems publicly sponsored, publicly endorsed, religiously motivated, or unduly coercive). All those phrases and others that the courts use are meant to root out when the idea of prayer has gone beyond voluntary and personal to mandatory or public or both.

In sum, while many types of close relationships between people of faith and public schools will be cottoned by the federal courts, when it comes to outward expressions of specific devotion, those advocates haven't got a prayer.

I Disapprove of What You Say, But I Will Defend Your Right to Say It: The Future of Student Speech Under the Equal Access Act Ten Years After *Mergens*

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Introduction

In 1984 the Equal Access Act[1] was signed into law by President Ronald Reagan. Over the past sixteen years a number of court cases concerning the Act have been decided, including one United States Supreme Court case, *Board of Education of Westside Community Schools v. Mergens*[2], which not only found the Act constitutional, but provided interpretation of a key provision of the Act. This interpretation pertained to the phrase "noncurriculum related student group." Second generation cases are now emerging with respect to the Supreme Court's interpretation of noncurriculum groups. The Act and the court cases which have helped shape the contours of the Act have had a measurable influence on student speech in the United States. The intent of this paper/presentation is to examine the impact of the Equal Access Act in the decade since *Mergens*. A succinct historical chronology of legislative and judicial development is first presented followed by an examination of critical contemporary issues.

Historical Chronology

Equal Access Act

On August 11, 1984, what is known as the Equal Access Act (EAA) was signed into law. The provisions of the Act read as follows:

> (a) **Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited.**
> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
>
> (b) **"Limited open forum" defined**
> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.
>
> (c) **Fair opportunity criteria**
> Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that--

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[1] 20 U.S.C. § 4071 (1994).

[2] 496 U.S. 226 (1990).

(1) the meeting is voluntary and student-initiated;
(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) **Construction of this subchapter with respect to certain rights**
Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof–
(1) to influence the form or content of any prayer or other religious activity;
(2) to require any person to participate in prayer or other religious activity;
(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
(5) to sanction meetings that are otherwise unlawful;
(6) to limit the rights of groups of students which are not of a specified numerical size; or
(7) to abridge the constitutional rights of any person.

(e) **Federal financial assistance to schools unaffected**
Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) **Authority of schools with respect to order, discipline, well-being, and attendance concerns**
Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

United States Supreme Court Action

The constitutionality of the Act, as it pertains to Establishment Clause violations, was upheld by the United States Supreme Court in *Board of Education of Westside Community Schools v. Mergens.*[3] The *Mergens* decision also provided clarification on a critically missing element in the Act, namely, the lack of a definition of the phrase "noncurriculum related student group."

The case involved the Westside High School, a public secondary school that received federal financial assistance and permitted its students to join, on a voluntary basis, a number of recognized clubs and groups (approximately thirty), which met before and after school on school premises. The board policy pertaining to student clubs and organizations considered these clubs as "a vital part of the total education program and as a means of developing citizenship, wholesome attitudes, good human relations, knowledge, and skills."[4] The policy required that each club have a faculty sponsor.

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[3] *Id.*

In January of 1985, Bridget Mergens requested permission to form a Christian Club at the school. The club sought all the privileges and agreed to meet on the same terms and conditions of all other Westside student groups, except that the proposed club would not have a faculty sponsor. The school denied the request, citing policy requirements that demanded a sponsor. It also took the position that a religious club at school would violate the Establishment Clause of the United States Constitution.

Legal action was initiated charging that the school's refusal to grant recognition to the club constituted a violation of the EAA. The federal district court sided with the school, ruling that the high school did not have a "limited open forum" as defined by the Act in that all the school's student clubs were curriculum-related and tied to the educational function of the school. The court of appeals reversed, finding that many of the student clubs were noncurriculum related.

The United States Supreme Court, after carefully reviewing the legislative history of the Act, affirmed and provided the following definition of the noncurriculum related student group:

> In light of the [the] legislative purpose, we think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a common sense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements.[5]

Other First Generation Judicial Decisions

In addition to the issues and questions treated by the United States Supreme Court, a number of other courts have been asked to clarify additional provisions of or issues related to the EAA throughout the first sixteen years of its existence. The primary cases, the issues or questions they treated, and the results thereof are succinctly presented in the following chronological summary:

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[4] *Id.* at 231.

[5] *Id.* at 239-240.

1985

***Student Coalition for Peace v. Lower Merion School District Board of Director*, 776 F.2d 431 (3rd Cir. 1985)**

> Question #1: *Does Act authorize a private cause of action?*
>
> > Answer: Yes. ". . . the Act was intended to create enforceable duties and corresponding rights." p. 440.
>
> Question #2: *Does Act apply to student-initiated events involving non-students?*
>
> > Answer: "We conclude . . . that student groups wishing to invite nonstudents onto school property are protected by the Act if the school's limited open forum encompasses nonstudent participation in student events, as long as those nonstudents do not 'direct, conduct, control, or regularly attend" such activities.
> > p. 442.
>
> Question #3: *When does the existence of a limited open forum invoke the EAA?*
>
> > Answer: ". . . the Act should be read to apply only if a limited open forum existed after the Act became law." p. 443.
> >
> > "We read the Act to give affected school districts a choice: either to create a limited open forum open to all student groups on an equal basis; or to refuse access to all noncurricular student groups." p. 442.

1987

***Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (M.D.Pa. 1987)**

> Question: *Does the distribution of religious newspapers in hallways of a junior high school during noninstructional time constitute a "meeting" under EAA?*
>
> > Answer: "The court concludes that the distribution of *Issues and Answers* [religious newspaper] in hallways of a school is not a 'meeting' under the definition in 20 U.S.C. § 4072(3) . . . " p. 1383.
> >
> > [Note: Same conclusion was reached in *Clark v. Dallas Independent School District*, 806 F.Supp. 116 (N.D.Tex. 1992); Efforts by religious club to advertise in school yearbook, where the school district had not adopted a limited open forum policy, was ruled not to be a "meeting" within meaning of the EAA, *see Perumal v. Saddleback Valley Unified School District*, 243 Cal.Rptr. 545 (Cal.App.4Dist. 1988)]

1991

***Hoppock v. Twin Falls School District No. 411*, 772 F.Supp. 1160 (D.Idaho 1991)**

Question: *Is the EAA enforceable given that the state constitution prohibits the use of school property by religious groups?*

Answer: Yes . "As the Supremacy Clause makes clear, the laws of Congress which are made 'in pursuance' of the Constitution will prevail whenever there is a direct conflict with the constitutional law of state." p. 1162.

[Note: Similar results came in *Garnet v. Renton School District No. 403*, 987 F.2d 641 (9th Cir. 1993) *cert. den.* 510 U.S. 819 (1993) where state (Washington) constitutional provision barred school officials from permitting religious organizations to meet on school property.]

1993

***Pope by Pope v. East Brunswick Board of Education*, 12 F.3d 1244 (3rd Cir. 1993)**

Question: *Does removing the right of students to initiate clubs create a limited open forum and thereby preclude the application of the EAA?*

Answer: No. "We . . . conclude that student initiation of clubs and other groups is not a requirement for triggering the Equal Access Act." p. 1251

***Sease v. School District of Philadelphia*, 811 F. Supp. 183 (E.D.Pa. 1993)**

Question: *What constitutes an "employee" under the EAA? Is a school secretary to be considered an employee for EAA purposes?*

Answer: Although the Act does not define the term employee, the court held as a matter of law that even though a secretary's duties and responsibilities did not require her to perform supervisory, didactic, or authoritative duties over students and her sponsorship (student religious singing group) was after working hours, she was a school employee under the meaning of the Act.

"If an employee ceases to be an employee under the statute during non-instructional time, then there would be no purpose for the provisions set forth in § 4071(c) of the Act." p. 192.

1996

***Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2nd Cir. 1996)**

Question: *May school officials deny a Student Bible Club under EAA where the proposed charter allows only Christians to be club officers and would thus violate school policy prohibiting all student groups from discriminating on the basis of religion?*

> **Answer: "We conclude that the Club's Christian officer requirement, as applied to some of the Club's officers, is essential to the expressive content of the meetings and to the group's preservation of its purpose and identity, and is therefore protected by the Equal Access Act. This application of the Act is constitutional because the school's recognition of the club will not draw the school into an establishment of religion or impair the school's effort to prevent invidious discrimination." p. 848.**

1997

***Ceniceros v. Board of Trustees of San Diego Unified School District*, 106 F.3d 878 (9th Cir. 1997)**

Question: *Is the lunch hour a noninstructional time within the meaning of the EAA?*

> Answer: "To fulfill the Act's broad purpose, the Court [United States Supreme Court] held that the Act must be given a 'broad reading.' [110 S.Ct. at 2360] Only by interpreting noninstructional time to include lunch periods can we adhere to the Supreme Court's instruction and have our interpretation be consistent with Congress' intent to provide a low threshold for triggering the Act's requirements [*See* 110 S.Ct. at 2366]." p. 881.

Another Look at *Pope*

Interestingly, most of the "first generation" cases revolve around peripheral aspects of the EAA that seem unlikely to cause ongoing controversy in public schools. For example, it is difficult to imagine districts continuing to battle students and clubs over whether the lunch hour is noninstructional time, or whether a school secretary is considered an "employee" under the Act. Yet while the EAA is poised to leave adolescence, it has certainly not completely matured. Conflict over what is really at the core of the EAA, i.e., the definition of "noncurriculum related student group," is just now beginning to erupt.

Only one "first generation" case, *Pope by Pope v. East Brunswick Board of Education,*[6] squarely addressed this issue. In *Pope*, the board's policy on student clubs closely tracked the language of the EAA and required all student-initiated clubs to be "curricular," stipulating that all such clubs must " be directly related to the specific subject matter which is the subject of one or more courses offered in the school district, concern the body of courses offered as a whole, or provide experiences which are deemed by the school district to enhance understanding of a course or courses offered within the district curriculum."[7] Pursuant to this policy, the board repeatedly denied the request of some high school students to obtain official recognition of their Bible Club, thus precluding the club from using the public address system, bulletin boards, and other school facilities commonly used by other student groups.

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[6] 12 F.3d 1244 (3rd Cir. 1993).

[7] *Id.* at 1247.

In the EAA lawsuit the students brought against the board, they alleged that the board had in fact created a "limited open forum" under the EAA by allowing the Key Club, a service organization associated with the Kiwanis, to meet. The plaintiffs asserted that the Key Club was in reality was not curriculum related, and that by allowing it to meet, the board was obligated to recognize all other noncurriculum student clubs.

Defending the "curricular" nature of the Key Club, the board provided the court with the following description of the club's purpose:

> This community service organization . . . assists and enhances the students in developing their civic responsibilities to the community and in support of the state's Thorough and Efficient Education requirements. The students in the Key service organization draw upon all curricula areas.[8]

Based on this "mission statement," the bulk of the club's activities involved student-initiated fund-raisers, the proceeds from which were donated to local charities, including groups dedicated to helping the homeless. The district asserted that "the subject matter of the Key Club is directly related to the high school's History and Humanities classes, which teach a unit on homelessness, hunger and poverty."[9]

Notwithstanding the board's characterization, the court held that the Key Club was in fact noncurricular and triggered a "limited open forum" under the EAA. First, the court noted that students received no academic credit for membership in the Key Club.

Second, the court found that the club was not curriculum-related because its activities did not concern the body of courses as a whole taught at the school. Explaining , the court reasoned:

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[8] *Id.* at 1252.

[9] *Id.*

> The [*Mergens*] Court did not suggest that student government would be curriculum-related because its activities related in some way to subjects taught across a high school curriculum; indeed, such a statement would be at odds with its earlier statement that the group-curriculum relationship must be more than "tangential or attenuated." We doubt, in fact, whether this principle in *Mergens* extends much further than the student government organization mentioned by the Court.[10]

Finally, the court concluded that the Key Club's subject matter was not related to the curriculum because it was not taught in any class. Again elaborating, the court observed:

> *Mergens* did not hold that the activities of a student organization need only relate in some marginal way to something taught in class. Rather, the Court said that the *subject matter* of the student group must be taught in a class. Thus, a chess club does not become curriculum-related merely because its subject matter relates to mathematics and science by building the ability to engage in critical thought processes; unless chess is actually taught, the club is a noncurriculum related student group. . . . A French club, on the other hand, is curriculum-related as long as the school teaches French in a regularly offered course. . . . Here, the relevant subject matter of one unit of Mr. Koenigsberg's History course is poverty and homelessness. The subject matter of the Key Club is *not* poverty and homelessness, but community-related service and fund-raising activities. The history course and the Key Club accordingly have different subject matter.[11]

In summary, the court noted that "a few isolated club activities cannot be permitted to turn an otherwise noncurriculum-related student group into a curriculum related one," and held that "the curriculum-relatedness of a student activity must be determined by reference to the primary focus of the activity measured against the significant topics taught in the course that assertedly relates to the group."[12]

Second Generation Cases: Three Variations on a Theme

Picking up where *Pope* left off, three federal courts have recently issued a trio of decisions that may portend significant EAA court activity for years to come. Each of these decisions, dealing with student clubs initiated by gay and lesbian students, grapples with the definitions of "curriculum" and "non-curriculum-related."

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[10] *Id.* (emphasis added).

[11] *Id.* at 1253.

[12] *Id.* (emphasis added).

1999

East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District,

81 F.Supp.2d 1166 (D.Utah 1999)

In the fall of the 1995-96 school year, a small group of students at East High School in Salt Lake City, Utah, formally requested school and district permission to form a noncurriculum student club known as the "Gay-Straight Student Alliance" (GSA). The GSA's application stated:

> We, the undersigned students of East High School, feel it necessary to form a club for gay, lesbian, and bisexual students, and their supporting heterosexual friends. The purpose of the club would be to increase awareness about homosexuality in high schools, to decrease homophobia, and to help gay, lesbian, and bisexual students feel safe and welcome in their school environment. We request permission to use a classroom for our meetings, and faculty sponsor to assist during the meetings. We do not request the use of announcement time, nor do we request the use of the hallways for flier announcements. We feel doing so would attract unwanted attention. We are extremely concerned for the safety and well being of our members.
>
> We are supported by many students, faculty, and parents, as well as several Utah organizations. The undersigned as well as many other students have been meeting unofficially off campus for nearly a month. The attendance at these meetings is about twenty people per meeting. We feel that ou[r] numbers are significant enough to form a club.
>
> Our meetings would be a time for discussion of topics deemed appropriate by the faculty advisor, and the students in attendance. We may also invite guest speakers. In addition, we will announce during our meetings the events and activities in which we will be participating.
>
> As an official club, we will plan a community service project. We will be volunteering for the Utah AIDS Foundation and the Utah Stonewall Center. We feel that by doing a monthly community service project, we will help our community, in general, to feel more comfortable with our club.
>
> All students and faculty members are welcome at meetings and are invited to participate in the discussion. There will be no discrimination against anyone for any reason, be it race, age, or sexual orientation. We feel quite confident that our diverse school would readily welcome a club that is against discrimination.[13]

Shortly after being notified of this application, Salt Lake City School District Superintendent Darline Robles and the Board of Education consulted the Utah Attorney General, as well as private counsel, to obtain legal opinions on whether they were legally obligated to accept the GSA's application and recognize it as a student club. Based on the opinions they received, Superintendent Robles and the board concluded that they essentially were limited to two options: 1) to allow the GSA to meet, along with other noncurriculum related student groups, subject to certain limitations; or 2) to prohibit all noncurriculum student groups and organizations, thereby avoiding the creation of a "limited open forum" as defined by the EAA.[14]

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[13] Matthew Hilton, *Options for Local School Districts Reviewing Local Governance and Moral Issues Raised by the Equal Access Act: The Gay-Straight Student Alliance in Utah*, 1996 **B.Y.U. Educ. & L. J.** 1, 4-5 (1996).

The board ultimately decided to move forward with the second option. Following a raucous public hearing on February 20, 1996, punctuated by shouts and insults from both proponents and opponents, the board voted 4-3 to ban all extracurricular student clubs, ranging from the Polynesian Club to Students Against Drunk Driving.[15] Specifically, the written policy adopted by the board read:

> The Board of Education of Salt Lake City School District desires to promote and advance curriculum related student clubs. However, the Board does not allow or permit student groups or organizations not directly related to the curriculum to organize or meet on school property. It is the express decision of the Board of Education of Salt Lake City School District not to allow a "limited open forum" as that is defined by the Federal Equal Access Act, 20 U.S.C. § 4071.[16]

Litigation promptly followed. In April 1996, two of the East High students and their parents, backed by the Utah and Northern California chapters of the ACLU, the Lambda Legal Defense and Education Fund, and the National Center for Lesbian Rights, filed suit against the board.[17] The students' discrimination claims focused on their allegation that the board, when it voted to ban all noncurriculum clubs, did not lawfully "close the forum," as the Court in *Mergens* indicated was a legitimate option available to school boards.[18] In short, the students alleged that the board had engaged in unlawful discrimination by inconsistently enforcing the "non-curricular" ban; the students claimed that several student clubs, which the board had allowed to continue meeting because they were "curriculum related," were in reality "non-curricular," obligating the board to recognize all "non-curricular" clubs, including the GSA.

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[14] *Id.*

[15] *Salt Lake City Board Opts to Ban All Clubs Rather than Sanction Gay Club*, **American Sch. Bd. J.**, April 1996, at 10.

[16] *East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist.*, 81 F.Supp.2d 1166, 1168 (D.Utah 1999).

[17] The plaintiffs subsequently amended their complaint to include allegations that the board continued to violate the EAA between 1996 and 1999; their Second Amended Complaint was filed on February 11, 1999.

[18] In discussing the local control school boards retain under the EAA, the Court explained in part that "schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act." *Mergens*, 110 S.Ct. at 2367.

On October 6, 1999, after nearly four years of legal wrangling, Senior Judge Bruce Jenkins of the Utah federal district court finally issued a ruling on the merits of the case, *East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist.*[19] In reaching its decision, which was mostly in favor of the board, the court was forced to analyze whether five student clubs were "curriculum related" or "noncurriculum related" under *Mergens*; the clubs at issue were the Improvement Council of East (ICE), Future Homemakers of America (FHA), Future Business Leaders of America (FBLA), National Honor Society (NHS), and Odyssey of the Mind (OM).

The court first analyzed the plaintiffs' proposed test for determining whether a student club is curriculum or noncurriculum related. According to the court, plaintiffs urged an analysis which first attempts "[t]o identify the primary focus of a student group' by reviewing 'the record as a whole for the activities of that particular group.' The group's activities are then 'assayed' to determine 'what is substantial activity or what is "isolated" activity,' and 'the various activities [are] assigned their proper weight.'"[20] Plaintiffs attempted to ground this analysis in the *Pope* holding, where the court observed that

> the curriculum-relatedness of a student activity must be determined by reference to the primary focus of the activity measured against the significant topics taught in the course that assertedly relates to the group.[21]

In other words, the plaintiffs argued that "'the primary focus of a student group cannot turn on what is only a "part" of its activities,' meaning that 'a "part" of a student group's activities cannot be the basis for providing a direct connection to the curriculum.'"[22] In order to determine the "primary focus" of a student group's activities, plaintiffs argued that the court must consider the group's "'relatively substantial activities.'"[23]

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[19] 81 F.Supp.2d 1166 (D.Utah 1999).

[20] *Id.* at 1177-78.

[21] *Id.* at 1253 (emphasis added).

The plaintiffs proposed a similar "assay process for determining the 'significant topics' actually taught in classes to which a group purportedly relates."[24] As explained by the court:

> Plaintiffs' "assay" method, aptly named, operates on the fundamental premise that various kinds of student group activities–social, fundraising, community service–are mutually exclusive of each other when it comes to determining the subject matter or "primary focus" of the club. For instance, plaintiffs appear to proceed upon the assumption that "community service" cannot "enhance, extend, or reinforce the specific subject matter of a class in some meaningful way," and that where a student group engages in significant community service activities "the relationship between club and class" must have "meaningfully diverged."[25]

Rejecting this approach, the court noted that *Mergens* "did not assay each every student activity for its substantive course content,"[26] and concluded:

> It follows that curriculum-related student groups, like non-curricular student groups, need not serve merely as an extension of the classroom experience in order to avoid triggering the Act's protections. Members of a curriculum-related group may socialize, raise funds, and even assist others as part of their group activities without altering the group's status under the Act.
>
> In earlier observing that "the required analysis under *Mergens* appears to be qualitative rather than quantitative," *East High Gay/Straight Alliance*, 30 F.Supp.2d at 1360, this court was suggesting in part that the required relationship between club and class is more logical than it is statistical in nature. To say that a particular group had "ten significant community service projects," four socials, three fundraisers, and that the "service projects were far greater in both absolute numbers and in substantiality, when compared to the socials," (Plts' Mem. At 30, 31) says essentially nothing about whether the activities draw upon skills taught in the classroom or provide valuable "hands-on" experience extending the learning process beyond what one reads in a textbook or hears in a class lecture. To say that the statistical category "community service projects" adequately characterizes a group's subject matter, and that as thus characterized "the group's subject matter is not actually taught in a course," takes the facts entirely out of the equation, leaving only empty abstractions.

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[22] *East High*, 81 F.Supp.2d at 1178.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1179.

> The soundness of this kind of reasoning seems doubtful at best. Indeed, this approach may permit a plaintiff to invoke the Act simply "by strategically describing existing student groups," exalting semantics over substance in essentially the same fashion as was condemned by the Court in *Mergens*.[27]

The court then went on to examine the board's contention that the classification of student clubs must be done solely with reference to the written application of the clubs. Arguing that an approved club's activities were irrelevant, the board argued that the court could only accurately evaluate the actions of district officials at the time a club submitted an application, because decisions to approve or deny clubs under the policy were made based on information presented in the application process. Rejecting the defendants' position as swiftly as it did the plaintiffs', the court reasoned:

> Recognizing that *Mergens*' definition of "noncurriculum related student activities" expressly "looks to a school's actual practice rather than its stated policy," defendants' suggested method treads too close to "permit[ting] schools to evade the Act by strategically describing existing student groups"–an approach soundly rejected by *Mergens*.[28]

The court concluded by holding that it would "examine the record of the student groups' actual activities as well as their stated purposes in order to make a qualitative determination as to curriculum-relatedness."[29] In so doing, the court found that during the 1997-98 school year, the district did create a "limited open forum" under the EAA by allowing the Improvement Council at East to meet. During that year, the ICE's stated mission was to create a "caring, positive school environment at East," but it was not integrated into student government and academic credit was not given to students participating in ICE activities. Therefore, the court found that it was a non-curricular student group and that the EAA rights of the GSA plaintiffs had been violated during the 1997-98 school year. At the same time, the court concluded that all of the other challenged clubs were curriculum-related, and that the ICE also became a curriculum-related club beginning with the 1998-99 school year when it was formally integrated into student government at East High School.[30]

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[27] *Id.* at 1179.

[28] *Id.* at 1180.

[29] *Id.*

[30] *Id.* at 1180-84.

2000

***Colin v. Orange Unified School District*, 83 F.Supp.2d 1135 (C.D.Cal. 2000)**

In September 1999, Anthony Colin and a number of friends at El Modena High School in Orange, California, submitted an application to school officials requesting to form a "Gay Straight Alliance Club" (GSA). Unlike the Salt Lake School District, the Orange Unified School District already had established a comprehensive written policy on student clubs. This policy stated in part that the district "believes that curriculum- and non-curriculum-related student organizations have an important place in students' lives . . . [and] enhance school spirit and students' sense of belonging."[31] Furthermore, the policy stated that the board has a "limited open forum in accordance with the provisions of the federal Equal Access Act" because it allows student groups "not directly tied to the curriculum."[32] Student non-curriculum clubs permitted by the board included the Asian Club, Black Student Union, Chess Club, Christian Club, Earth Club, Eighties Club, Girls' League, Koinonia (for Catholic students), Juggling Club, Mountain Bike Club, Red Cross/Key Club, and Ski Club.[33]

The GSA application submitted by Colin indicated that the purpose of the GSA was "to promote interest in a supportive community amongst our peers." Elaborating, the club's written mission statement explained:

> Public schools have an obligation to provide an equal opportunity for all students to receive an education in a safe, nonhostile, nondiscriminatory environment. Our goal in this organization is to raise public awareness and promote tolerance by providing a safe forum for discussion of issues related to sexual orientation and homophobia. We wish to stress the need for people to put aside their personal prejudice and agree to treat everyone with respect when the situation calls for it. We invite ALL students, gay or straight, to join us in discussions, field trips, lectures, and social activities that will counterattack unfair treatment and prejudice. We respect privacy and require NO one to make disclosures regarding his or her own sexual orientation. This is not a sexual issue, it is about gaining support and promoting tolerance and respect for all students.[34]

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[31] 83 F.Supp.2d 1135, 1143 (C.D.Cal. 2000).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1138.

In an interesting twist, the board rejected the GSA application not by following Salt Lake and declaring the forum closed to non-curricular clubs, but rather by asserting the following argument: 1) the GSA would deal with matters in the curriculum, i.e., human sexuality and health education; 2) the board, acting pursuant to state law, not students, had the prerogative to determine the manner in which curriculum was delivered, especially on such sensitive topics; 3) therefore, the club would not be allowed because the "unrestricted, unsupervised student led discussion of sexual topics is age inappropriate and is likely to interfere with the legitimate educational concerns of the District in this sensitive area of sex education."[35] As in Salt Lake, litigation promptly ensued, with the student plaintiffs asking the federal district court to grant a preliminary injunction allowing them to begin meeting immediately.

Ruling in favor of the students, the court made two important findings. First, the court held that the GSA is a non-curriculum student group because "there is no overlap between the curriculum and the GSA's proposed discussions."[36] In fact, the court reasoned, it would take "a significant leap of the imagination to believe that the same board that voted unanimously against permitting this group on campus has also included the subject matter of what Plaintiffs intend to discuss in the curriculum."[37] Elaborating, the court stated:

> [E]ven if there were some small nexus between what is taught in some classes and what the group proposes to discuss, it would require considerably more for the Gay-Straight Alliance to be considered curriculum related under *Mergens*. The subject matter of the group, dealing with their personal experiences of homophobia and seeking to improve relations among and between gay and straight students, is not "actually taught . . . in a regularly offered course" at El Modena.[38]

Second, the court found that even if the GSA were deemed to be a curriculum-related student group, the EAA would still preclude the board from allowing it to meet, because the only meetings the EAA allows schools to prohibit are those that would "materially and substantially interfere with the orderly conduct of educational activities within the school."[39] Thus, the court noted:

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[35] *Id.* 1139-40.

[36] *Id.* at 1145.

[37] *Id.*

[38] *Id.* (quoting *Mergens*, 110 S.Ct. at 2356).

> [T]he Board will have to show that meetings will "materially and substantially interfere with the orderly" instruction of students. The Board will not likely be able to show that groups of students discussing homophobia and acceptance of all students regardless of sexual orientation somehow serves as a major disruption to the education of students. Indeed, this club is actually being formed to avoid the disruptions to education that can take place when students are harassed based on sexual orientation.[40]

2000

***East High School Prism Club et. al. v. Seidel*, 95 F.Supp.2d 1239 (D. Utah 2000)**

The third decision in the swirling vortex of cases attempting to sort out the meaning of *Mergens*' definition of "curriculum-related" also comes from Salt Lake City. In the fall of the 1999-2000 school year, several students at East High School submitted an application to have their club named PRISM ("People Recognizing Important Social Movements") approved as a curriculum-related student group. On the application, the students described the purpose of the club as follows:

> This club is about American history, government, law and sociology. We want to talk about democracy, civil rights, equality, discrimination and diversity.
>
> . . .
>
> Our club is not about "advocating homosexuality," promoting a partisan platform, or discussing sexual behavior. We agree with the school district's non-discrimination policies and with the United States Constitution that all students should have an equal voice and be treated with equal respect.
>
> We . . . would like to initiate the "PRISM Club" in order to expand and enhance our study and understanding of American history and government, law and social institutions, which are topics covered in the U.S. History, American Government and Sociology courses currently taught here at East High School, and to gain hands-on experience in applying the concepts and skills taught in those courses.
>
> . . .

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[39] 20 U.S.C. § 4071(c)(4).

[40] *Colin*, 85 F.Supp. At 1146.

> The club will serve as a prism through which historical and current events, institutions and culture can be viewed in terms of the impact, experience and contributions of gays and lesbians.
>
> There is an ongoing dialogue in our community, our state and our country about such issues as whether gays and lesbians should be allowed to serve openly in the military and in organizations such as the Boy Scouts, to marry, to adopt children and form families, and in general to enjoy the full rights of citizenship. That dialogue is directly related to many of the topics covered in the U.S. History, American Government, and Sociology courses at East High. Pursuing that dialogue in the PRISM Club will allow us to put what is taught in those courses into practice.
>
> . . .
>
> We feel that the PRISM club will benefit East High School students and members of the community by giving interested students an opportunity to enhance their knowledge of American history, government, law and social institutions and to gain a more concrete understanding of how they affect the real lives of gay and lesbian people.[41]

The application also listed the following proposed activities: "letter writing to public officials, keeping up [sic] and debating current events, tutoring, guest speakers, field trips, reviewing historical events, reports on influential GLBT [Gay, Lesbian, Bi-sexual, and Transgendered] persons and events, [and] group discussions."[42]

Notwithstanding the club's detailed application, Assistant Superintendent Cynthia Seidel, who had the responsibility for reviewing and either granting or denying student club applications under the boards February 20, 1996 policy, rejected the club. In a written decision to the students, Seidel based her decision on the grounds that "the organizing subject matter of the club narrows to 'the impact, experience, and the contributions of gays and lesbians' in historical and current events, institutions, and culture. This subject matter is not taught in the courses you cite."[43]

Ruling in favor of the students, and issuing a preliminary injunction ordering the district to allow the club to meet, federal district judge Tena Campbell found that the club's proposed mission and activities were in fact "directly related" to several courses in the high school curriculum; Judge Campbell stated: "A review of the course objectives, attached to the club application, demonstrates that the subject matter proposed to be discussed at PRISM Club meetings is actually taught in courses at East High School."[44]

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[41] 95 F.Supp.2d at 1242-43.

[42] *Id.* at 1243.

[43] *Id.* at 1247.

Perhaps most importantly, however, Judge Campbell refused to allow Seidel and other district officials to apply an unarticulated "no narrowing rule" to their policy allowing only curriculum-related student groups. Specifically, the court rejected the board's assertion that in addition to a requirement that the subject matter of the club actually be taught in a class, "curriculum-relatedness" also requires that the subject matter of the club not be too narrow.

The court began its analysis of this issue by noting that the district's policy did not contain an explicit "no narrowing" rule; it stated only that: "A student club is curriculum related if . . . [t]he subject matter of the group is actually taught or soon will be taught in a regular course." In making this observation, the court emphasized that if "the school board wished to include a "no narrowing" rule, it could have easily added such a sentence to the . . . policy."

More importantly, the court rejected the board's position that without its educationally responsible "no narrowing" rule, it would be forced to approve virtually all proposed clubs, even those tangentially related to a curriculum class. Dismissing this argument, the court reasoned: "even without an implicit 'no narrowing' rule, not all speakers would be allowed access to the forum because the IGDA Policy contains express limitations: the subject matter of the club must still relate to curriculum classes and the application must be endorsed by a club advisor. Because there are limitations, not all club applications will be approved and the forum is not entirely open."

Concluding, the court held: "'[C]urriculum-related' means what Seidel says it means: the subject matter of the group must actually be taught in an academic class. There is no requirement (explicit or implicit) that the club address the entire subject matter of the class from every conceivable viewpoint."[45]

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[44] *Id.* at 1247.

[45] *Id.* at 1248.

Questions

This trio of cases, combined with the *Pope* decision and ambiguities within *Mergens* itself, raise several important legal and policy questions, including:

1) If the *East High* court is correct in its conclusion that the analysis of whether a student group's activities are curriculum or non-curriculum related is a qualitative, as opposed to a quantitative, analysis, has the second prong of the *Mergens* test been eviscerated? In other words, is it now impossible for either students or school districts to prove their point concerning whether "the subject matter of the group concerns the body of courses as a whole?

2) If the analysis of whether a club is "curricular" as opposed to "noncurricular" is really a "qualitative" one, as Judge Jenkins suggests, are there any objective standards that can be applied so that school districts have some reliable guidance to follow, or does the term "qualitative" simply mean the subjective opinions of federal judges, which are unpredictable at best?

3) Furthermore, is quantitative inquiry improper for an analysis of prong one of the *Mergens* test, that is, the "subject matter of the group is actually taught, or will soon be taught, in a regularly offered course?" The court's decision in *PRISM* appears to indicate that even if a club's subject matter narrowly touches on the courses regularly taught, it should be considered curriculum-related.

4) May school boards adopt "no narrowing" rules by policy in order to expand or preserve their discretionary authority over the curriculum? Judge Campbell's decision in *PRISM* was based in part on the fact that the court would not apply an unwritten policy to the facts at issue. At the same time, Judge Campbell implied that boards might be able to adopt such policies, by noting: "If the school board wished to include a 'no narrowing' rule, it could have easily added such a sentence to the IGDA Policy."[46]

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[46] *Id.* at 1247.

5) To what extent do school boards still, as the *Mergens* court observed, "maintain their traditional latitude to determine appropriate subjects of instruction?" Even though under *Mergens*, a school may choose "to structure its course offerings and existing student groups to avoid the Act's obligations," the decisions in *East High*, *Colin*, and *PRISM* seem to call that authority into question. This is especially true where state legislatures have enacted statutes governing certain types of curriculum (sex education, etc.) and even student clubs.[47]

6) How might the *East High* plaintiffs' proposed "assay analysis," relying heavily on, as in *Pope*, the "primary focus" of the group's activity weighted against the "significant topics" taught in the courses(s) related to the group, change the landscape for both lawyers and school districts should it become a more widely accepted analysis?[48]

7) Should school boards quit worrying about whether a club is curriculum or non-curriculum related and start focusing more intensely on whether a group's proposed speech and/or activities will "materially and substantially interfere with the orderly conduct of educational activities within the school?" Or has the *Tinker* standard, as it is reiterated in the EAA, reached a point that it is so unworkable as to leave boards no other choice than to focus on the curriculum/non-curriculum issue?

Emerging Issues

Perhaps the most compelling problem in this arena is that lower courts appear to be interpreting the EAA in a manner inconsistent with prior Supreme Court decisions dealing with student speech and the curriculum. For example, the court's opinion in *Colin* could be viewed as a departure from long-standing precedent granting school authorities wide discretion to limit student speech that touches on sexual topics.

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[47] *See, e.g.*, Utah Code Ann. § 53A-3-419.

[48] It should be noted that the *East High* plaintiffs have appealed to the Tenth Circuit, in part because they are dissatisfied with the district court's rejection of their "assay analysis." *See East High Gay/Straight Alliance v. Salt Lake School Board*, http://www.acluutah.org/GSAsummary.htm.

The *Colin* opinion states in part: "The only way to maintain the 'independence and vigor of Americans who grow up here' is through tolerating speech that school authorities may vehemently disagree with. . . . The democratic response to speech that people disagree with is more speech: by allowing students to express both the popular and unpopular viewpoints society can foster 'enlightened opinion.'"[49] At the same time, the court, while not citing *Bethel*[50] directly, appears to consciously diverge from its holding, by stating:

> Though the state education system has the awesome responsibility of inculcating moral and political values, that does not permit educators to act as "thought police" inhibiting all discussion that is not approved by, and in accord with the official position of, the state. The danger is that public education could transform schools into "enclaves of totalitarianism" and convert students into "closed-circuit recipients of only that which the State chooses to communicate." Though it may educate many of Orange's students, the Orange Unified School District must not become an Orwellian "guardianship of the public mind," that can "strangle the free mind at its source."[51]

While the court's decision not to apply *Bethel* was probably based on its conclusion that the GSA's mission statement articulated that "sex, sexuality, [and] sex education . . . will not be the subject of discussion in club meetings," it is somewhat hard to imagine how a student club devoted to bringing students together on issues related to homosexuality will never engage in topics of a sexual nature. Indeed, Colin's club application expressly stated that the club would provide a "safe forum for discussion of issues related to sexual orientation and homophobia."[52] How does one discuss "sexual orientation" without having "sex" and "sexuality" become part of the subject of discussion?

Moreover, conflict arises because a significant Supreme Court case on student speech within the curriculum, *Hazelwood School Dist. v. Kuhlmeier*, 108 S.Ct. 562 (1988), might be interpreted to give school authorities broader authority over student speech than the authority they have over speech under the EAA. The EAA clearly states that a "limited open forum" is created, and must be acknowledged, when secondary schools allow noncurriculum student groups to meet, and where there is "no sponsorship of the meeting by the school, the government, or its agents or employees."[53] The EAA also contains an interesting definition of the term "sponsorship:" "The term 'sponsorship' includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting."[54]

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[49] *Colin*, 83 F.Supp.2d at 1141 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969), and *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

[50] *Bethel School Dist. No. 403 v. Fraser*, 106 S.Ct. 3159 (1986).

[51] *Colin*, 83 F.Supp.2d at 1141 (citations omitted).

[52] 83 F.Supp.2d at 1138 (emphasis added).

This definition creates confusion when it is held up against the Supreme Court's definition of the term "curriculum" in *Hazelwood*:

> The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[55]

Not only might many "non-curriculum related" student clubs be reasonably perceived as bearing the imprimatur of the school, since they meet on school grounds, during school time, with school approval, they might fit within the *Hazelwood* definition of curriculum; notwithstanding the EAA's definitions, most student clubs are "supervised by faculty members" and designed (whether by students or faculty) to "impart particular knowledge or skills to student participants and audiences." If in fact, all or most student clubs are actually "curriculum related," the question then becomes: What legitimate pedagogical restraints are schools entitled to impose, if any? Bringing student religious, political, and other types of speech within the curriculum certainly would pose its own set of problems, not the least of which would be determining how schools would avoid Establishment Clause violations.

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[53] 20 U.S.C. § 4071(c)(2).

[54] 20 U.S.C. § 4072(2).

[55] *Hazelwood*, 108 S.Ct. at 570 (emphasis added).

Thus, the $64,000 question is: how do schools allow student speech in the club context without appearing to the public that they sponsor the speech, and without completely ceding the authority they possess to determine "what manner of speech in the classroom or in school assembly is inappropriate."[56] Or does the EAA essentially obligate school boards to adhere to the stance articulated by Voltaire: "I disapprove of what you say, but I will defend to the death your right to say it."[57]

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[56] *Bethel*, 106 S.Ct. at 3164.

[57] **The Quotable Lawyer** 285 (David Shrager & Elizabeth Frost, eds., 1986).

How to Control Student Behavior and Expression: If There's an Educational Will, There's a Constitutional Way

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I. INTRODUCTION

Student discipline continues to be a major issue in public education. The 31st Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, conducted in 1999, identified the biggest problems facing the public schools to be (#1) lack of discipline/more control and (#2) fighting/violence/gangs.

Whether or not this public perception is correct, it does emphasize the need for public school officials to address directly the issue of student behavior. But many school boards and administrators believe that their authority has been severely constrained by court rulings favoring the constitutional rights of students in school discipline cases. What are the realities of the law in this area?

That the Constitution extends to public school students certain substantive and procedural rights has been settled law for many years. See, e.g., Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975). But these constitutional protections do not give students unfettered freedom to do as they wish.

The Supreme Court has often affirmed the authority of school officials in matters of student discipline. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker at 507. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Goss at 580.

Furthermore, the Court has recognized that school officials have a real obligation to instill a sense of order and discipline. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). "Even in schools that have been spared the most severe disciplinary problems, the preservation of order and proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." New Jersey v. T. L. O., 469 U.S. 325, 339 (1985).

As the Court noted in Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995), "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate' [citation deleted], the nature of those rights is what is appropriate for children in school." Id. at 655-56.

II. SELECTED CASES

A. SCHOOL OFFICIALS "IN CHARGE"

1. School Officials v. Parents

Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243 (5th Cir. 1984) (at her request, student was given three spanks though parent chose suspension).

Ennis v. Beason, 537 So. 2d 17 (Ala. 1988) (parent resisted junior high school student's 2-day suspension).

Brown v. Hot, Sexy, and Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995) (sexually explicit material in AIDS awareness program).

Immediato v. Rye Neck Sch. Dist., 73 F.3d 454 (2nd Cir. 1996) cert. denied, 117 S. Ct. 60 (community service requirement).

Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996), cert. denied, 117 S. Ct. 949 (community service graduation requirement).

2. School Officials v. Students

a. Retention and removal

Erik V. v. Causby, 977 F. Supp. 384 (E.D. N.C. 1997) (retention of elementary student due to standardized test scores).

Hartfield v. East Grand Rapids Pub. Sch., 960 F. Supp. 1259 (W.D. Mich. 1997) (retention of middle school student).

Casey v. Newport Sch. Comm., 13 F. Supp.2d 242 (D. R.I. 1998) (high school student removed from science class for misbehavior).

b. Control of Curriculum

Zykan v. Warsaw Comm. Sch. Corp., 631 F.2d 1300 (7th Cir 1980) (removal of books from library and courses from curriculum).

c. Student Expression

Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.s. 260 (1988) (defining the rights of students and authority of school officials).

West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000) (student suspended for drawing Confederate flag on piece of paper during math class).

Henerey v. City of St. Charles, 200 F.3d 1128 (8th Cir. 1999) (disqualification of candidate for class president for distributing condoms as part of his campaign).

Saxe v. State College Area Sch. Dist., 77 F. Supp 2d 621 (M.D. Pa. 1999) (anti harassment policy distinguished from hate speech policy).

d. Dress and Grooming

Baxter v. Vigo County Sch. Corp., 26 F.3d 728 (7th Cir. 1994) (elementary school student prohibited from wearing t-shirt critical of the school administration).

Jeglin v. San Jacinto Unified. Sch. Dist., 827 F. Supp. 1459 (C.D. Cal. 1993) (high school rule prohibited wearing clothing identifying professional or college teams).

Broussard v. School Bd., 801 F. Supp. 1526 (E.D. Va. 1992) (middle school student prohibited from wearing t-shirt with the message "Drugs Suck").

Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556 (D. N.M. 1995) (high school student suspended for wearing sagging pants).

Olesen v. Board of Educ., 676 F. Supp. 820 (N.D. Ill. 1987) (high school dress code forbade males from wearing earrings).

Harper v. Edgewood Bd. of Educ., 655 F. Supp 1355 (S.D. Ohio 1987) (two students removed from high school prom for wearing clothes of the opposite sex).

Phoenix Elem. Sch. Dist. No. 1 v. Green, 943 P.2d 836 (Ariz. Ct. App. 1997) (policy requiring uniforms for continued attendance at magnet school).

e. Privacy

(1). Searches of body, lockers, cars

New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of purse).

In re Alexander B., 270 Cal. Rptr. 342 (Cal. 1990)

Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) (strip search for drugs)

Thompson v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996) (general search for a knife of all male students in grades six-twelve).

Commonwealth v. Carey, 554 N.E.2d 1199 (Mass. 1990) (search of locker for gun).

Washington v. Slattery, 787 P.2d 932 (Wash. Ct. App. 1990) (search of car for drugs).

Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987) (search of hotel room while on band trip).

Desilets v. Clearview Regional Bd. of Educ., 627 A.2d 667 (N.J. Super. Ct. 1993) (search of hand luggage before participating in activity).

(2). Using dogs, metal detectors, surveillance equipment

People v. Pruitt, 662 N.E.2d 540 (Ill. Ct. App. 1996) (use of metal detector).

People v. Dukes, 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992) (use of metal detector).

(3). Drug testing

Veronia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (random drug testing for participation in activities).

f. "Punishment"

(1). Wood v. Strickland, 420 U.S. 308 (1975); Board of Educ. v. McCluskey, 458 U.S. 966 (1982); Ingraham v. Wright, 430 U.S. 651 (1977) (broad authority of public school officials to impose punishment).

(2). Varieties of "punishments"

Means v. Sidiropolis, 401 S.E.2d 447 (W. Va. 1990) (driver's license suspended for dropping out of school).

Williams v. Turner, 382 So. 2d 1040 (La. Ct. App. 1980) (expulsion of elementary students for threatening teacher).

In the Matter of Phillips, 497 S.E.2d 292 (N.C. Ct. App. 1998) (suspension of high school student for stealing school's cash and checks).

Paredes v. Curtis, 864 F.2d 426 (6th Cir. 1988) (suspension for possession of look-alike drugs).

Cross v. Princeton City Sch. Dist., 550 N.E.2d 219 (Ohio Com. Pleas 1989) (expulsion of high school student for possession of drug paraphernalia).

James v. Unified Sch. Dist. No. 512, 899 F. Supp. 530 (D. Ka. 1995) (expulsion for possession of firearm).

Spencer v. Unified. Sch. Dist. No. 501, 935 P.2d 242 (Ka. Ct. App. 1997) (suspension for possession of look-alike firearm).

Peterson v. Independent Sch. Dist. No. 811, 999 F. Supp. 665 (D. Minn. 1998) (suspension for possession of BB gun).

Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995) (expulsion of high school student for possession of lipstick case knife based on mandatory expulsion policy).

Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Educ., 286 Cal. Rptr. 915 (Cal. Ct. App. 1991) (expulsion of high school student for use of stun gun on student at a different campus).

Jensen v. Reeves, 45 F. Supp.2d 1265 (D. Utah 1999) (suspension of elementary student for misbehavior toward other students).

Engele v. Independent Sch. Dist. No. 91, 846 F. Supp. 760 (D. Minn. 1994) (elementary student sent home for last 10 days of school for own protection).

Nevares v. San Marcos County Ind. Sch. Dist., 111 F.3d 25 (5th Cir. 1997) (involuntary transfer of high school student).

Barrino v. East Baton Rouge Sch. Bd., 697 So. 2d 27 (La. Ct. App. 1997) (high school student not allowed to graduate due to school not accepting late assignments).

Saylor v. Board of Educ., 118 F.2d 507 (6th Cir. 1997) (middle school student beaten for fighting).

Reed v. Vermillion Local Sch. Dist., 614 N.E.2d 1101 (Ohio Ct. App. 1992) (high school student suspended and given an "F" for stealing a test).

Zellman v. Independent Sch. Dist. No. 2758, 594 N.W.2d 216 (Minn. Ct. App. 1999) (high school student given a "0" for plagiarism).

Wiemerslage v. Maine Township High Sch. Dist. 207, 824 F. Supp. 136 (N.D. Ill. 1993) (high school student suspended for being in off-limits area).

Jones v. Witinski, 931 F. Supp. 364 (M.D. Pa. 1996) (teacher grabbed arm of middle school student and pulled him across desk).

Brooks v. School Bd., 569 F. Supp. 1534 E.D. Va. 1983) (teacher disciplined student by sticking arm with a straight pin).

Clinton Municipal Sep. Sch. Dist. v. Byrd, 477 So.2d 237 (Miss. 1985) (high school students suspended for defacing school property).

Cole v. Newton Spec. Mun. Sep. Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987) (punishments relating to suspension, isolation, detention).

Wallace v. Bryant Sch. Dist., 46 F. Supp.2d 863 (E.D. Ark. 1999) (middle school student punished by spending three periods in room to side of classroom).

Dornes v. Lindsey, 18 F. Supp.2d 1086 (C.D. Cal. 1998) (expulsion of middle school student for drug possession based on hearsay evidence).

London v. Directors of DeWitt Pub. Sch., 194 F.3d 873 (8th Cir. 1999) (expulsion of student because of altercation with teacher).

g. Loss of activities

Thompson v. Fayette County Pub. Sch., 786 S.W.2d 879 (Ky. App. 1990) (minimum GPA to participate).

Bush v. Dassell-Cokato Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990) (high school student lost athletic letter and suspended from activities for a period the following school year for non-drinking presence).

Brands v. Shelton Community Sch., 617 F. Supp. 627 (N.D. Iowa 1987) (suspended from participation for involvement in gang rape of student off campus).

h. Constitutional Rights and Due Process

B. SCHOOL OFFICIALS CAN GO TOO FAR

Pratt v. Independent Sch. Dist. No. 831, Forest Lake, 670 F.2d 771 (1982) (removal of film from curriuculm).

Stephenson v. Davenport Community Sch. Dist., 110 F.3d 1303 (8th Cir. 1997) (student required to remove tatoo).

Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5th Cir. 1987) (elementary student tied to a chair).

Orange v. County of Grundy, 950 F. Supp. 1365 (E.D. Tenn. 1996) (high school student held in isolation in supply room).

Goldwire v. Clark, 507 S.E.2d 209 (Ga. Ct. App. 1998) (expulsion of high school student for role in bomb threat phone call).

T.H. III v. Board of Trustees, 681 So. 2d 110 (Miss. 1996) (high school student challenged alcohol policy on its face and as applied).

Alabama & Coushatta Tribes of Texas v. Big Sandy Indep. Sch. Dist, 817 F. Supp. 1319 (E.D. Tex. 1993) (hair length rule for male students).

Lovell v. Poway Unified Sch. Dist., 847 F. Supp. 780 (S.D. Cal. 1994) (suspension for threatening to shoot a counselor).

Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986) (suspension for giving teacher "the finger" off campus).

James P. Ex Rel. Robert P. v. Lemahieu, 84 F. Supp. 2D 1113 (D. Hawaii 2000) (no evidence that rule had been violated). 142 ELA 233

Cales v. Howell Pub. Sch., 635 F. Supp 454 (E.D. Mich. 1985) (strip search of high school student for drugs based on general suspicion of wrongdoing).

B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999) (random dog sniff search).

Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290 (N.D. Ga. 1999) (strip search of fifth graders to find $26).

Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000) (random drug tests of student drivers to detect nicotine).

C. SOME DUE PROCESS CONSIDERATIONS

Goss v. Lopez, 419 U.S. 565 (1975) (minimal due process required for suspension of 10 days or less).

Kolesnick v. Omaha Pub. Sch., 558 N.W.2d 807 (Neb. 1997) (education not fundamental right).

III. Conclusion

School administrators and boards of education can exercise constitutionally the legal authority necessary to fulfill their responsibility for ensuring a safe and orderly school environment. But there are basic constitutional principles that must be followed.

Rules that purport to regulate student conduct or expression must provide clear notice to both the students who are to abide by them and to the school officials who are to enforce them.

When imposing discipline for student misbehavior, it is not always clear whether or not a protected property or liberty interest is at stake. School officials should provide at least the basic protections of procedural due process.

When imposing discipline for student misbehavior, school officials should be certain that there is at least some evidence that the student violated a school rule.

If enforcement of a school rule does not impinge on the exercise of any constitutionally protected right, the student will have the burden of showing that there is not an adequate justification for the rule. But whether or not the enforcement of a rule will impinge on a constitutionally protected right is not always clear; therefore, school officials should have an educational justification for any rule that regulates student conduct or expression.

If enforcement of a school rule impinges on the exercise of a constitutionally protected right, school officials should assume that they have the burden of justifying the need for the rule. School officials should be able to carry this burden, if they have a sound educational rationale for adopting and enforcing such a rule.

The adoption and enforcement of any school rule should be premised on some reasonable educational ground. If school officials think through the educational justification for actions they take to regulate student conduct and expression, they are likely to administer their schools in a manner consistent with constitutional principles.

Legal Challenges Facing the Charter School Movement

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Education Law Association
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Atlanta, Georgia

LEGAL CHALLENGES FACING THE CHARTER SCHOOL MOVEMENT

The History of Charter Schools

There is no provision for public education in the Federal Constitution. Therefore, by virtue of the Tenth Amendment[1], governance of public education has fallen to the States, and each State has chosen its own unique approach to pursuing its educational mission. Nowhere is this more evident than in development of charter schools, a trend sweeping a nation desperately seeking workable innovative solutions to its educational problems.

The seeds of the Charter School Movement were philosophically planted by Albert Shanker, the late president of the American Federation of Teachers, when he discussed Massachusetts education consultant, Ray Budde's report *Education by Charter,* in his *New York Times* Column "Where We Stand."[2] Charter schools were to be part of an effort to empower teachers through participatory site-based management of the educational program. However, the Charter Movement that has evolved often leaves the teachers Shanker hoped to empower behind, floundering in its wake..

Charter schools are schools created by state statutes and run by private parties which may or may not include public school teachers. Depending on a state's authorizing legislation, teachers (certified or non-certified), parents, existing public schools, private schools, non-profit agencies, and even for profit firms can apply to receive charters.[3] From the start, the states have, in varying degrees, sought to free charter schools from the regulatory schemes and obligations thought to be inhibiting needed innovation in public education. A primary purpose of all charter schools is to free the schools from the public school bureaucracy as well as other external controls, in order to facilitate the development of more innovative educational practices.[4] Nevertheless, charter schools, like the public schools they rival, are financed by State funding. In addition to state subsidization of charter schools, the Federal government has also fiscally supported the development of charter schools. *The Goals 2000: Educate America Act* gives states the option of using federal funds to develop charter schools,[5] and the *Improving America's Schools Act of 1994*, reauthorizing the Elementary and Secondary Education Act, earmarked six million dollars for fiscal year 1995 to support a new federal program to finance the design and implementation of charter schools.[6] As a result of these funding arrangements, charter schools will receive funding for every student enrolled, with typical legislation providing for state funding equaling the average expenditure per child in the district.

The Chartering Process

Basically, groups wishing to start a charter school petition for approval of their proposed plans. Proposals are required to cite educational goals and to discuss how the proposing group hopes to achieve these goals. For example, in Connecticut applicants are required to submit a non-sectarian mission statement, a description of school governance procedures and of the school's educational program, student admissions criteria, and assessment procedures.[7] Charter school proposals are reviewed by legislatively authorized bodies. A designated body or agency essentially gives permission and public funds to entities that apply for charters with the purpose of establishing and operating primary and secondary schools free from statutory and regulatory constraints of existing educational code, that is, free from centralized control and the bureaucracy of existing public school districts.[8] The make up of the bodies reviewing charter proposals and the appeal procedures available differ from state to state, however, charter licenses, once issued, usually last between three and fifteen years.[9]

Throughout this period of licensure, as noted, charter schools are freed from many of the regulations and organizational restrictions which limit the way in which public schools carry out their missions. In California, for example, charter schools may choose to be exempted from all state laws governing school districts.[10] Likewise in Arizona, charter schools are exempt from state laws that govern school districts, and, because they are funded directly by their chartering boards, which may be independent of the school districts in which they are located, Arizona's charter schools are also free of district regulation or interference. In Connecticut " an application may include or a charter school may file requests to waive provisions of the general statutes and regulations . . .within the jurisdiction of the State Board of Education."[11] Likewise in Florida " a charter [school] shall operate in accordance with its charter and shall be exempt from all statutes of the Florida School Code, except those pertaining to civil rights and student health, safety, and welfare, or as otherwise required by this section."[12] And in Massachusetts "upon written request from a charter applicant or charter school board of trustees, the Secretary may waive the applicability of one or more provisions of the education code."[13] Charter schools enjoy this relative freedom from control in exchange for performance-based accountability. They are ultimately judged by student achievement, and parental satisfaction. It is, however, this same relative freedom from law and regulation which would appear to pose a variety of legal challenges for the charter school movement.

Law and the Charter School Movement

This presentation will pose some of the principal legal issues arising out of the charter school movement, and will discuss relevant legislation, legal principles, and existing case law that may predict the outcome of these prospective challenges. In order to make this workshop a participatory learning experience, those attending are asked to respond to the questions posed in advance, and to provide what they deem to be legally defensible reasons for the positions they take. Discussion will center on whether or not participants' positions are supported by the existing legislation, legal principles, and case law addressing each issue. It is the goal of this presentation to lead an exploratory discussion of the legal ramifications of the Charter School Movement.

The outline which follows poses several threshold legal questions regarding the development, implementation, and maintenance of charter schools. Following each question are the sites to laws, legal principles and existing cases that are likely to play a role in determining the legal response to the question posed. The presentation will elaborate on each of these cites and will use them to project answers to the questions posed regarding the present functioning and future fate of the charter school movement.

Do Charter Schools Have a Legal Right to Exist? Why or Why Not?

Thus far there have been two court actions challenging the existence of charter schools. Both allege that the *creation* of the charter schools in question is unconstitutional, but for different reasons.

Villanueva v. Carere, 85 F.3d. 481 (10th Cir. 1996)

Council of Org. & Others for Educ. About Parochaid v. Governor of Mich., No. 94-78461-AW (Mich. Cir.Ct., County of Ingham, Nov. 1, 1994), aff'd, 548 N.W. 2d 909 (Mich. App. 1996).

Are Charter Schools Agents of the State Subject to Constitutional Limitations?

Public schools are agents of the State subject to all mandates and proscriptions of the United States Constitution. If charter schools are also found to be agents of the state subject to constitutional limitations, this would seriously affect charter school policies regarding both student and employee rights issues. Dress codes, locker searches, free expression, and admissions policies would all be subject to the same restrictions and threats of litigation now experienced by traditional public schools. If charter schools are *not* subject to constitutional limitations, they would be free to develop and enforce policies with greater control over every aspect of student and employee performance.

In order to find a charter school subject to constitutional limitations a court must either (a) declare that the school is a government agency, or (b) find that it falls within one of the *exceptions* to the "state action doctrine" which would subject it to constitutional limitations despite its status as a private entity.[14] There have been several important nonschool cases that appear to deal with this issue.

See *San Francisco Arts & Athletics, Inc. v. U.S.O.C., 483 U.S. 522 (1987).*

See *Lebron v. National R.R. Passenger Corp., 115 S.Ct. 961 (1995).*

See *American Bankers Mortgage Corp. v. Federal home Loan Mortgage Corp., 75 F.3d at 1401, 1409 (9th Cir. 1996*, citing *San Francisco Arts & Athletics , 483 U.S. at 543-46).*

Each of these cases addresses the central question of whether a corporation that is created and influenced by the government should it be considered the government for purposes of litigating constitutional rights-based claims. In the course of deciding these nonschool cases, the Supreme Court has promulgated several tests which may eventually be used to determine the legal status of charter schools.

The Lebron Test (1995)

(1) Did the government create the entity?
(2) Are its objectives governmental?
(3) To what extent does the government direct and control the entity's pursuit of those objectives?

The San Francisco Arts & Athletics Test (1987)

(1) Is there a nexus between the government and the challenged action?
(2) Did the alleged government actor perform functions traditionally exclusively reserved to the government?
(3) Did the government coerce or encourage the challenged action?

The State Action Doctrine (1982)

See *Lugar v. Edmonson Oil Co., 457 U.S. 922, 932 (1982).*
See also *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).*

> Conduct allegedly causing the deprivation of a federal right [may] be fairly attributable to the State when: First, the deprivation is caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Do Charter Schools Exercise a Function Traditionally the Exclusive Prerogative of the State?

The following cases give examples of how the Court will identify a function as the exclusive prerogative of the State.
See *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).*
See *Flagg Brothers v. Brooks, 436 U.S. 149, 163 (1978).*

See *Rendell-Baker v. Kohn, 457 U.S. 830 (1982).*

Is Government Licensing and Regulation of Charter Schools Sufficient to Constitute State Action?

See *Moose Lodge Number 107 v. Irvis, 407 U.S. 163 (1972).*

See *Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).*

The Burton Test

> To find State action the Court will look for these elements: dependence by the private entity on government-endowed privileges, the appearance of government approval of the private conduct, mutual benefit from the relationship between the public and private entities, and, a specific connection between the government's regulation and the challenged action itself.

Can Charter Schools Discriminate in Their Admissions Policies? For Example, Can a Charter School Admit Students on the Basis of Academic Merit?

See Abby R. Weiss & Nancy Sconyers, *A National Survey and Analysis of Charter School Legislation: A Report to The Citizens of the State of Connecticut,* Institute for Responsive Education, Boston, Mass., Feb. 1, 1996. This comprehensive report discusses legislated responses to the question of charter school academic admissions policies.

> In Minnesota, charter schools are prohibited from basing admission on academic ability. Arizona,California, Colorado, Michigan, and Wisconsin state generally that admissions criteria for charter schools must not be discriminatory.

How will the Supreme Court's Reinstatement of States Rights Affect the Charter School Movement?

There are a wide range of federal laws under which citizens can bring suits against the states or their agencies. Title VII, Title IX, The Americans with Disabilities Act, The Age Discrimination in Employment Act, The Fair Labor Standards Act, Section 504, and the Individuals with Disabilities Education Act are just a few of the more familiar federal statutes that have spurred litigation, particularly in the public school setting. Congress, in passing each of these acts, forces states to comply with them by predicating federal funding on compliance. However, recent Supreme Court decisions appear to be scaling back Congress' power to apply federal legislation to states.[15]

See *Seminole Tribe of Fla. v. Florida, 517 U.S. 44 ( )*

See *United States v. Lopez, 115 S.Ct., 1624 (1995).*

See *Alden v. Maine, 527 U.S. 706 (1999).*

In *Alden v. Maine* the Supreme Court held:

Under the federal system established by the Constitution, the States retain a "residuary and inviolable sovereignty." The Federalist No. 39, p. 245. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty. The founding generation considered immunity from private suits central to this dignity. The doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. In addition, the leading advocates of the Constitution gave explicit immunity. This was also the understanding of those state conventions that addressed state sovereign immunity in their ratification documents. When, just five years after the Constitution's adoption, this Court held that Article III authorized a private citizen of another State to sue Georgia without its consent, *Chisholm v. Georgia, 2Dall. 419,* the Eleventh Amendment was ratified. An examination of *Chisholm* indicates that the case, not the Amendment, deviated from the original understanding, which was to preserve States' traditional immunity from suit. The Amendment's text and history also suggest that Congress acted not to change but to restore the original constitutional design. Finally, the swiftness and near unanimity with which the Amendment was adopted indicate that the Court had not captured the original understanding. This Court's subsequent decisions reflect a settled doctrinal understanding that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution. Since the Amendment confirmed rather than established sovereign immunity as a constitutional principle, it follows that that immunity's scope is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design. (Pp. 3-20)

Whether Congress has the authority under Article I to abrogate a State's immuity in its own courts is, then a question of first impression. History, practice, precedent, and the Constitution's structure show no compelling evidence that this derogation of the States' sovereignty is inherent in the constitutional compact. (Pp. 31-48)

A review of the essential principles of federalism and the state courts' special role in the constitutional design leads to the conclusion that a congressional power to subject nonconsenting States to private suits in their own courts is inconsistent with the Constitution's structure.

Will States Be Able to Use Their Sovereign Immunity to Ignore Obligations Imposed by Federal Legislation?

See *Kimel v. Florida Board of Regents, et al, 120 S.Ct. 631 (2000), as a case in point.*

Congress cannot decree the substance of the restrictions of the Federal Constitution's Fourteenth Amendment on the states, as Congress has been given the power to enforce, not the power to determine what constitutes a constitutional violation; the ultimate interpretation and determination of the Amendment's substantive meaning remains the province of the judicial branch.

States may discriminate on the basis of age without offending the Federal Constitution's Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest; the rationality commanded by the Amendment's equal protection clause does not require states to match age distinctions and the legitimate interest they serve with razorlike precision; under the Amendment, a state may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the state's legitimate interests, as (1) the Constitution does not preclude reliance on such generalizations, and (2) that age proves to be an inaccurate proxy in any individual case is irrelevant.

. . .state employees are protected by by state age discrimination statutes, and may recover money damages from their state employers, in almost every state.

The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

If States Are Immune from Suits by Individuals Alleging Violations of Federal Laws Such as the ADA, ADEA, IDEA and Federal Labor Standards Act, Will CharterSchools Also Be Immune from Suits Alleging Violations of These and Similar Federal Laws?

Are Charter Schools Obligated to Comply with the IDEA? Why or Why not?

See *Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)*
. . .the intent of the Act [IDEA] was more to open the door of public education to [children with disabilities] on appropriate terms than to guarantee any particular level of education once inside.

The Act guarantees a "basic floor of opportunity. . . access to specialized instruction and related services which are individually designed to provide educational benefit."

See *Tucker v. Calloway County Bd. of Educ., 136 F. 3d 495 (6th Cir. 1998).*
Parents are not entitled to dictate educational methodology or compel a school district to supply a specific program where the parties agreed on an IEP but disagreed on the exact placement.

See *E.S. v. Independent Sch. Dist., No. 196, 135 F.3d 566 (8th Cir. 1998).*
As long as a student is benefitting from the education provided, it is up to the educators to agree on the appropriate methodology.

See *Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998).*

The IDEA does not require a program to maximize the potential of a disabled child.

How Has the Charter School Movement Effected Collective Bargaining?

See *Hearne, et al., Plaintiffs-Appellants v. Board of Education of the City of Chicago, 185 F.3d 770, 1999 U.S. App. LEXIS 16367, July 16, 1999.*

In Chicago only, career service employees may no longer bargain over job security matters, and educational employees are precluded from bargaining over issues like the impact of charter schools on personnel, decisions to privatize and their impact on employees, layoffs and reductions in force, class size decisions, and the impact of experimental and pilot programs.

. . .legislatures should be permitted to experiment with methods of governing public institutions without undue interference from the courts. . . .What appears to the plaintiffs as "less generous employment rights" may have seemed to the legislature as increased flexibiltiy for school administrators to take swift action to correct problems.

See *Education Week, "Changing the Rules of the Game," June 14, 2000, Pp. 24-29.*

This article discusses the Vaughn Learning Center, a charter school in the impoverished Pacoima section of Los Angeles.

Vaughn converted to charter status in 1993, and as part of its charter has no collective bargaining. As a result, Vaughn has initiated the following revolutionary approaches to employee management:

1. Vaughn has an extended year program.
2. Vaughn has a class size of no more than 20.
3. Vaughn has set aside $323,400 of its budget for merit pay.
4. Additional course work does not translate into more pay.
5. A rubric based on Charlotte Danielson's *Enhancing Professional Practice: A Framework for Teaching* is used to determine merit awards.
6. Bonuses for demonstrated skill can be up to $13,000 above scaled salary.
7. Teachers and administrators get bonuses of $1500 if schoolwide goals are met.
8. Individual teachers get contingency bonuses of $250 for goals in student attendance and parent involvement.
9. Teachers are observed four times a year by an administrator and another teacher.
10. Teachers self-evaluations are one third of their final merit pay scores.
11. Teachers may choose not to participate in the merit pay program, but will then remain on the fixed

salary scale.
(Only 19 of 73 teachers chose this option)

How Will Charter Schools Affect the Future of Collective Bargaining?

What is the difference between charter schools not subject to collective bargaining agreements and voucher schools?

ENDNOTES

1. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. Justin M. Goldstein, "Note: Exploring 'Uncharted' Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution," *7 S.Cal. Interdis. L.J. 133,* Summer, 1998.

3. See, e.g., ARIZ.REV.STAT.ANN. Sec. 15-183 (1996) (allowing a "public body, a private person, a private organization to apply for a charter"); 1996 CONN. ACTS 214 (REG. SESS.) (any person, association, corporation, organization or other entity, public or independent institution of higher education, local or regional board of education or two or more boards of education cooperatively, or regional educational service center may apply); KAN.STAT.ANN. Sec. 72-1903 (1995) (allowing school building or school district employee groups, educational service contractors, and other persons or entities to apply.

4. See Priscilla Wohlstetter et al., "Charter Schools in the United States: The Question of Autonomy, in 9 *Educational Policy* 331, 348 (1995).

5. *20 U.S.C.S. 5812 (1997).*

6. Pub. L. 103-382, 108 Stat 3518 (1994).

7. See 1996 Conn. Acts 214 Sec. 2(d) (Reg. Sess.).

8. Karla A. Turekian, "Note and Comment: Traversing the Minefields of Education Reform: The Legality of Charter Schools," *29 Conn. L. Rev. 1365, Spring, 1997.*

9. See, e.g., Ark Stat. Ann. 6-10-116 (Michie Supp. 1997) (three year term); Ariz. Rev. Stat. Ann. 15-183(I) (West Supp. 1997) (fifteen year term).

10. Cal. Educ. Code 47600-47616 at 47610 (West 1993 & Supp. 1997).

11. 1995 CONN. ACTS 214.

12. FLA. STAT. ANN. sec. 228.056 (11) (West, 1996).

13. MASS. GEN. L. ANN. ch. 71, Sec. 89 (19960.

14. Goldstein, p. 4.

15. M. Walsh, "Tug of War Over States' Powers Has Lawyers Watching Closely," *Education Week,* February 23, 2000, Volume XIX, No. 24: 30.

THE FUTURE OF SPECIAL EDUCATION LAW

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THE FUTURE OF SPECIAL EDUCATION LAW: THE SCHOOL BOARD PERSPECTIVE

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I. Introduction

Since the time the IDEA was first enacted and initially referred to as the Education for All Handicapped Children's Act, the law has resulted in many changes for the education of students with disabilities in the public schools. Many of these changes have been favorable and have resulted in access to appropriate educational services. There are areas of the current law that may be refined with future reenactments of IDEA. This paper will highlight some of those anticipated changes as they affect school boards.

II. Funding

Currently under the Individuals With Disabilities Education Act, funding for the public schools is provided by the federal government in an amount anticipated to be only 13% of the total cost. It is hoped that future efforts will result in full funding of the IDEA at the anticipated 40% level. The NSBA is pursuing support for increased funding.

III. Eligibility

Future cases under the IDEA will deal more and more with eligibility for special education services. There is increased incentive for parents to have their children identified as disabled for the following reasons.

A. High Stakes Testing

Many states require that a student be identified as disabled in order to receive accommodations on high stakes testing. As more and more states adopt high stakes testing, it can be anticipated that parents will push for special accommodations so that their children can pass the tests. This situation will result in an increased demand for identification of students as disabled in order to obtain accommodations.

1. Testing Disabled Students

a. Per IDEA 1997 and the 1999 Department of Education Federal Regulations, students with disabilities are to be included in state and district-wide assessments.

b. IDEA 1997 [20 U.S.C. §1412 (a) (17)]

Participation in assessments.

(A) In General - Children with disabilities are included in general state and district-wide assessment programs, with appropriate accommodations, where necessary. As appropriate, the state or local educational agency --

(i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in state and district wide assessment programs; and

(ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments.

b. IDEA 1997 [20 U.S.C. §1414(d)(1)(A)(v)]

(v)(I) a statement of any individual modification in the administration of state or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular state or districtwide assessment of student achievement (or part of such an assessment), a statement of --

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed.

c. Department of Education Regulations [34 C.F.R. §300.138]

Participation in assessments.

The state must have on file with the Secretary information to demonstrate that -

(a) Children with disabilities are included in general state and district wide assessment programs, with appropriate accommodations and modifications in administration, if necessary.

(b) As appropriate, the state or LEA--

(1) Develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in state and district-wide assessment programs;

(2) Develops alternate assessments in accordance with paragraph (b)(1) of this section; and

(3) Beginning not later than July 1, 2000, conducts the alternate assessments described in paragraph (b)(2).

d. Joint Policy Memorandum on Assessments from the Office of Special Education and Rehabilitative Services and the Office for Civil Rights, 27 IDELR 138 (Sept. 29, 1997).

(1) Exclusion of students with disabilities from assessments violates Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act; and the IDEA 1997.

(2) "IDEA 1997 expressly requires the inclusion of students with disabilities in both state and district-wide testing." 27 IDELR 138.

(3) Accommodations must be provided for those students with disabilities who require accommodations in order to participate and such accommodations should be listed in the student's IEP or Section 504 plan.

(4) Not all students with disabilities must participate in the assessments.

1. Decisions not to include a student with a disability must be made by each individual student's IEP team.
2. The IEP must include a statement of why a student will not participate.
3. The IEP must indicate alternative assessment methods for a student unable to participate in assessments.

e. Alternate assessment programs for students with disabilities who are unable to participate in state and district-wide testing must be developed and begin to be implemented by July 1, 2000, per IDEA 1997.

B. Discipline

Parents are quickly learning that students who are involved in disciplinary trouble will receive special consideration if they are identified as disabled. One aspect of this special consideration is the availability of educational services to suspended or expelled students with disabilities. This legal requirement will result in increased demand for identification, even on a post-disciplinary basis, so that the student will continue to receive educational services.

IV. Discipline

It can be anticipated that more and more statutory and regulatory changes will be made governing the discipline of students with disabilities. These refinements will be required due to ambiguities and loopholes in the current discipline provisions. Now that discipline is addressed in the IDEA, it can be expected that more refinements will occur, making the process even more legalistic.

A. Children for whom there is no knowledge of a disability

1. If the school division has no reason to suspect a disability prior to taking disciplinary measures, the student may be subjected to the same disciplinary measures as a student without disabilities who commits comparable offenses.

2. Limitations:

    a. If a request is made for an evaluation while the child is subjected to disciplinary measures an evaluation must be conducted in an expedited manner. There is no definition of expedited but it must be appreciably faster than the timeline for a regular evaluation.

    b. The child will remain on suspension or expulsion which can include a denial of all educational services, while the evaluation is being conducted.

    c. If the child is later determined to have a disability, taking into consideration the evaluation of the school division and the parent's information, the child must be provided special education and related services in accordance with IDEA.

B. DECISIONS

1. Crown Point Community School Corporation, 32 IDELR 77 (SEA 2000). School district not required to provide special education services to suspended student where the school was previously aware of child's "lazy eye" condition, but an evaluation showed it did not rise to the level of "visual impairment." Discipline was appropriate.

2. Liberty County School District, 31 IDELR 176 (SEA 1999). School District was ordered to find child OHI, to purge two years of discipline records and to provide compensatory education.
3. Capistrano Unified School District, 31 IDELR 199 (SEA 1999). Student not eligible for special education services on the basis of his long-term depression because the depression did not affect his academic performance. Any failure by the school district was not prejudicial.
4. Sonoma Valley Unified Sch. Dist., 31 IDELR 153 (SEA 1999). IDEA's stay-put provisions did not apply to student previously eligible for special education services under Section 504 for vision problems where his marijuana possession had no connection to his vision problems or poor academic performance.
5. Deer Park Indep. Sch. Dist., 31 IDELR 259 (IHO 1999). School District denied student a FAPE where it failed to timely identify student as disabled and opined that even if appropriate measures under the IDEA had been taken, the student would have committed the subject misconduct. School district prohibited from disciplining student in the form of a change of placement for misconduct that occurred prior to the implementation of special education services.
6. Corpus Christi Independent School District, 31 IDELR 41 (SEA 1999). Student with a history of misconduct was found eligible, but no compensatory services were ordered.
7. Terrell County (GA) Sch. Dist., 29 IDELR 918 (OCR 1998). Student was not considered to be treated as ADHD when parent had not provided notice of the diagnosis.
8. Windsor C-1 Sch. Dist., 29 IDELR 170 (1998). Student entitled to compensation where school district failed to evaluate student for special education services after incident led to sheriff being called. School district also failed to conduct complete and thorough evaluation and IEP for student.
9. Dickinson Indep. Sch. Dist., 29 IDELR 290 (SEA 1998). Student with an extensive history of discipline problems was not entitled to consideration as disabled. Subsequent referral was timely.
10. Wareham Public Schools, 27 IDELR 1176 (SEA 1998). The student who was not eligible for services was entitled to remain in the current placement when an evaluation was initiated.
11. Ashland School District, 28 IDELR 630 (SEA 1998). Student who had exhibited poor behavior and earned low grades previously was entitled to be found eligible as disabled as a 12th grade student and was entitled to compensatory education.
12. Birmingham Board of Education, 28 IDELR 407 (SEA 1998). Student who was identified initially as ADHD and was later identified as learning disabled, after the hearing was requested, was appropriately disciplined.

13. Autauga County Bd. of Educ., 28 IDELR 539 (SEA 1998). Student was not entitled to IDEA protection earlier when the student had good grades and behaviors in the past year.

14. Mobile County Bd. of Educ., 23 IDELR 594 (SEA 1995). Student with few prior disciplinary incidents was not emotionally disturbed nor entitled to IDEA protection.

15. In Re J.W., 23 IDELR 459 (SEA 1995). Student disciplined for detonating an explosive device was found to be ED and reinstatement and expungement were ordered.

16. South Harrison (IN) Community School Corp., 20 IDELR 1360 (OCR 1993). Student identified as ADHD was not an eligible student and was subject to discipline for fighting.

17. Dorchester County (SC) School District, EHLR 353:184 (OCR 1988). School district was not shown to have used discipline instead of special education referrals.

THE FUTURE OF SPECIAL EDUCATION LAW
PART I: EMPIRICAL TRENDS ANALYSIS

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PRESENTATION AT THE ANNUAL CONFERENCE OF THE EDUCATION LAW ASSOCIATION
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In this first foundational part of our panel's presentation, I present a brief review of the empirical literature concerning trends in special education law. The two trends of relevance here are longitudinal data specific to 1) the frequency, or volume, of special education litigation; and 2) the outcomes of this litigation in terms of the proportion of cases that each party – parent and district – won.[1] In light of the nature of special education cases, "litigation" is interpreted broadly to include not only court but also administrative, typically hearing and review officer, decisions.[2]

Litigation Volume

In a study based on the Westlaw database, Zirkel found reported special education litigation in federal courts increased dramatically from the 1970s to the 1990s while the overall volume of education litigation in federal courts declined.[3] The trend was similar but less pronounced in the state courts, with the intervening decade of the 1980s being an additional differential factor.[4]

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[1] Thus, this research review does not include, for example, empirical studies of the frequency or outcomes of special education hearings or court cases that were not longitudinal. *See, e.g.*, Martin Diebold & Robert Simpson, *An Investigation of the Effect of Due Process Hearing Officer Occupation on Placement Decisions*, 11 DIAGNOSTIQUE 69 (1986); Barbara Kammerlohr et al., *Special Education Due Process Hearings in Illinois*, 49 EXCEPTIONAL CHILDREN 417 (1983); David Kirp & Donald Jensen, What Does Due Process Do, PUB. INTEREST 75 (982);Peter Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 J.L. & CONTEMP. PROBS. 898 (1985); Joseph McKinney & Geoff Schultz, Hearing Officers, *Cases Characteristics and Due Process Hearings*, 111 WEST'S EDUC. L. REP. 1069 (1996); James Newcomer et al., *Characteristics and Outcomes of Special Education Hearing and Review Officer Cases*, 123 WEST'S EDUC. L. REP. 449 (1999); James Newcomer & Perry Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILDREN 469 (1999); Barbara Roberts & Kelly McMerrow, *Special Education Due Process Revisited*, 27 PLANNING & CHANGING 243 (1996); Tom E. Smith, *Status of Due Process Hearings*, EXCEPTIONAL CHILDREN 232 (1981); Julie Underwood & Jane Noffke, *Good News; The Litigation Scales Are Titling in Your Favor*, EXECUTIVE EDUCATOR 16, 19-20 (March 1990); Sharon Eubank, An Analysis of Special Education Due Process Hearing in Texas(1984)(unpublished Ed.D. dissertation at East Texas State University); Jacqueline Jackson, A Descriptive Study of Special Education Due Process Hearings in the District of Columbia (1988)(unpublished Ed.D. dissertation at George Washington University); Linda O'Connor Rhen, An Analysis of Special Education Due Process Hearings in Pennsylvania (1989)(unpublished Ed.D. dissertation, Temple University); Melinda Robinett, Special Education Due Process Hearings: State Differences (1993)(unpublished Ed.D. dissertation, Virginia Polytechnic Institute); John Stewart, An Investigation of Predispositions for Placement of Handicapped Children by Special Education Due Process Hearing Officers (1987)(unpublished Ed.D. dissertation, University of Alabama); *cf.* Barbara Legg & Kelly McMerrow, *Special Education Due Process Revisited*, PLANNING & CHANGING 243 (1996)(longitudinal data limited to one state, frequencies only in terms of issues, and outcome data that did not provide specific comparisons); Phyllis Monoson, The Legal Aspects of Connecticut Special Education Hearing Decisions for Emotionally Disturbed and Learning Disabled Children (1987)(unpublished Ed.D. dissertation, University of Bridgeport)(longitudinal data limited to six years for two disability categories within one state);;

[2] For the sake of thoroughness, this review includes longitudinal data concerning the frequency and outcomes of Office for Civil Rights letters' of findings. See Zirkel, *infra* note 19.

[3] Perry Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 WEST'S EDUC. L. REP. 341, 348-49 (1997). The limitations in such data include double counting of cases (where one case yielded more than one reported ruling) and dependence on West's key-number classification system. Using the same database but a different statistical technique, Imber and Gayler obtained parallel findings for the overall trends but did not separately examine special education or other categories of education litigation. Michael Imber & David Gayler, *A Statistical Analysis of Tends in Education-Related Litigation*, 24 EDUC. ADMIN. Q. 55 (1988). A follow-up study analyzed the frequency trends for certain categories but not

In their brief research report in 1995, Maloney and Shenker found that the number of court decisions reported in the Individuals with Disabilities Education Law Reports (IDELR) generally increased from 1978 to 1992 but declined moderately in 1993 and 1994.[5] The most frequent issues were "litigation" (14%), apparently referring to civil procedure; attorneys' fees (11.1%), money damages (9.8%), responsibility for provision/funding (9.6%), and least restrictive environment (9.4%).[6] The states with the highest frequency of decisions were: New York (12.0 %), Pennsylvania (6.7%), Illinois (6.4%), New Hampshire (5.3%) and the District of Columbia (5.3%); California 4.6%), Virginia (4.3%), and Massachusetts (4.2%).[7] The highest frequencies in terms of federal circuit were: the Second Circuit (15.8%), the 1st Circuit (11.6%), the 3rd Circuit (10.9%), the Sixth Circuit (8.7%), and Ninth Circuit (8.5%).[8] Finally, for the cases that were identifiable in terms of the child's disability, the following classifications were the most frequent: learning disability (27.4%), physical impairment (22.3%), emotional disturbance (13.8%), and mental retardation (20.1%).[9]

In a follow-up report in 1996, Gorn analyzed a sample of 1,001 judicial decisions published in IDELR from 1978 to 1996.[10] She found that the most litigious states were New York (9.7%), Illinois (7.3%), the District of Columbia (6.5%); Pennsylvania (6.0%),

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special education. Michael Imber & Gary Thompson, *Developing a Typology of Litigation in Education and Determining the Frequency of Each Category*, 27 EDUC. ADMIN. Q. 225 (1991). The follow-up study also included the results of a national survey of school districts, mentioning that "about 80% of all the equal opportunity ... cases could be placed in the handicapped ... subcategory." *Id.* at 237.

[4] Zirkel, *supra* note 1, at 346-47.

[5] MELINDA MALONEY & BRIAN SHENKER, THE CONTINUING EVOLUTION OF SPECIAL EDUCATION LAW (1995)(LRP Publications); *see also What the Numbers Say about Special Education Litigation*, 10 THE SPECIAL EDUCATOR 325 (MAY 27, 1995). They briefly described their same as consisting of "more than 1,200 judicial decisions rendered from 1978 through the first quarter of 1995," but their frequency tabulation, which ended in 1994, totaled 1,141 decisions. *Id.* at iii and 3. The difference in ending date or total may be attributable to the time lag for publication. Their frequency tabulation for issues 1978 to 1994 totaled 1,399, but they apparently accounted for multiple (specifically an average of 1.2) issues per case. Moreover, they included cases that are not what is typically considered under the rubric of "special education," such as negligence (4.1%), teacher termination and other personnel issues (1.9%), civil rights (1.4%), and insurance benefits (.5%). *Id.* at 14-16. Finally, they did not explain whether they included cases subject to more than one or no opinion.

[6] *Id.* at 15.

[7] *Id.* at 5-9. Next were Connecticut (3.3%), New Jersey (3.2%) and Texas (3.2%), and Tennessee (3.0%). *Id.*

[8] *Id.* at 11-12.

[9] *Id.* at 13. They did not report frequency sizes, as compared to percentages, for each disability classification; thus, the number of cases that amounted to missing data is not ascertainable from their report.

[10] SUSAN GORN, WHAT'S HOT, WHAT'S NOT: TRENDS IN SPECIAL EDUCATION LITIGATION (1996)(LRP Publications). She started with the "more than 1,200 judicial decisions" published in IDELR for this period but eliminated multiple decisions, decisions without opinion, class action cases, cases in which parents were not parties, and "those small number of opinions that, for one reason or another, did not truly advance a position advocated by either party." *Id.* at ix and 31. She did not acknowledge, much less discuss, the Maloney & Shenker report, although it also emanated from LRP staff.

Virginia (5.7%), and – tied for sixth place – California (5.0%) and New Hampshire (5.0%).[11] She further found that the most frequent issues were: civil procedural matters, such as exhaustion and statute of limitations (18%); attorneys' fees – 17%; procedural safeguards (13%) and placement (13%); damages (10%); educational programming (9%); and non-IDEA claims (7%).[12] Finally, she identified these disabilities as being, in order, the most frequent: learning disability (29.8%), emotional disturbance (16%), multiple cognitive disabilities (14.8%), mental retardation (10.5%), hearing impairment(7.8%), and physical impairments (6.6%).[13]

Based on an annual survey,[14] National Association of State Directors of Special Education (NASDE) reported that the frequency of special education due process hearings at the first tier[15] increased from 1,574 in 1991 to 3,315 in 1998.[16] The frequency of hearings, or at least review proceedings, in two tier states during the same period remained relatively level, ranging between 207 in 1993 and 301 in 1995, with starting and ending points of 242 in 1991 and 288 in 1998.[17]

Zelin went a step further by computing the rates of IDEA hearings, administrative appeals, and judicial appeals on a state-by-state basis in terms of an index consisting of the frequency at each level divided by the number of IDEA-eligible students, but his analysis was limited to one year, 1995.[18]

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[11] *Id.* at 31. Next were Tennessee (4.3%), Massachusetts (3.9%), Texas (3.7%), and Michigan (3.0%). *Id.*

[12] *Id.* at 34. She provided examples of each issue category and addressed overlap by not limiting her classification of issues to one per case (finding, on average, 1.4 issues per case). *Id.* at 34-35.

[13] *Id.* at 35. These classifications do not entirely square with those listed in the IDEA definition of disability, but they presumably reflect the predominant descriptor in the court's opinion. These classifications, like those of the case issues, raise the issue of interrater agreement, which she did not empirically address. In any event, she explicitly acknowledged that not all opinions mentioned the child's disability, and this tabulation totaled 850 of the 1001 cases in her sample.

[14] *Due Process Hearings: 1999 Update*, FORUM (NASDSE. Alexandria, VA), Dec. 1999. The report acknowledges gaps and inconsistencies in the data, attributable in part to differing state record-keeping periods, changes from the one-tier to two-tier arrangement, and failure to collect or at least report data for certain levels or years. *Id.* at 2.

[15] The IDEA allows states the option of having only one tier, consisting of due process hearings at the local level, or two tiers, adding review proceedings at the state level. The trend in recent years has been from a two-tier to a one-tier arrangement. In 1999, there were 32 one-tier states and 19 two-tier states. *Id.* at 1-2.

[16] *Id.* at 5. The last three years appeared to amount to a descending plateau, with respective totals of 3555, 3402, and 3315. *Id.* The most frequent states for this period were California (n=9477), D.C. (n=6662++), New Jersey (n=5867), Massachusetts (n=4134), Illinois (n=3863), and Pennsylvania (n=3076). Each "+" here signifies missing data for one year.

[17] *Id.* at 6. The most frequent states for this period were New York (n=7848), D.C. (n=2744++), New Jersey (n=1623++), and Pennsylvania (n=1087). *Id.* Again, each "+" represents missing annual data.

Finally, Zirkel found that Office for Civil Rights (OCR) rulings, counted on an issue-by-issue rather than case-by-case basis, generally increased from 1978 to 1990 but generally declined since then.[19] The most frequent issues were free appropriate public education (FAPE) (n=480), evaluation (n=310), and placement (n=258).[20]

Litigation Outcomes

In an analysis of the outcomes of Supreme Court k-12 student cases, Zirkel found a crazy-quilt pattern for the limited number of special education decisions, which contrasted with the increasingly school-friendly pattern for most other categories of student cases, such as discipline and desegregation.[21]

Finally, Zirkel found that parents won a majority of the OCR "issue rulings," based on Sec. 504 and the ADA, from 1978 to 1990, but that schools have won a majority of these

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[18] Gerald Zelin, Rate of Due Process Hearings and Appeals under the Individuals with Disabilities Education Act: A State-by-State Comparison (1999)(unpublished chart on file with Attorney Gerald Zelin, gmz-zam@nh.ultranet.com). The administrative-appeal level only applied in the 25 "two-tier" states. He pointed out that the frequency data were not free from glitches, being based on NASDSE's survey for 1995. In any event, the following results for the high-volume states for first-tier hearing exemplify the differences between indexed and non-indexed figures:

	hearings held	hearings held per 10,000 eligible students
New York	1,136	28.8
New Jersey	275	14.0
Connecticut	114	15.0
Pennsylvania	112	5.3
Illinois	87	3.4
California	77	1.8
Virginia	45	2.3
Rhode Island	43	17.2
Texas	33	.8

Additionally, New Hampshire, which ranked 18th in terms of hearings held on a non-indexed basis (n=11), ranked fifth (r=4.4) on an indexed basis. *Id.*

[19] See Perry Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 WEST'S EDUC. L. REP. 369, 375 (1997). The reason for counting issues rather than cases is that there was, on average, more than one issue per case. The ending point for this analysis was 1995.

[20] *Id.* at 377.

[21] Perry Zirkel, *National Trends in Education Litigation: Supreme Court Decisions Concerning Students*, 27 J.L. & EDUC. 235 (1998). He identified six Supreme Court special education decisions. *Id.* at 241. In contrast, he categorized *Zobrest v. Catalina Foothills School District.*, 509 U.S. 1 (1993) under religion (Establishment Clause), rather than special education (IDEA), and he did not include *Cedar Rapids Community School District v. Garrett F.*, 119 S. Ct. 992 (1999) because it was decided after publication of his article. He attributed the crazy-quilt pattern to not only the individualized orientation and prescriptive contents of the IDEA but also the interaction of the legislative and judicial processes. *Id.* at 241 n.25.

rulings since then.[22] Overall, the issue rulings were in favor of parents 55%, as compared to 45% for the districts.[23] In terms of individual, rather than institutional, issues,[24] parents were particularly successful in terms of individual notice (67%), LRE (65%), FAPE (64%) and particularly unsuccessful in terms of retaliation (16%), discipline (41%), and eligibility (45%).[25]

Maloney and Shenker's analysis of IDELR decisions, which are largely but not entirely based on the IDEA, only provided outcome data on an overall and issue-by-issue, not longitudinal, basis,[26] and Gorn's follow-up study did not report any overall, much less, longitudinal outcome data.[27]

Due to the lack of comprehensive longitudinal outcome data for special education cases, I intend to have ready the preliminary results of a pertinent pending study for presentation at the Convention.

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[22] Zirkel, *supra* note 19, at 375. Interestingly, 1990 was the high point for both volume and outcomes. "Issue rulings" here refers to the outcome in terms of whether OCR found a violation of Section 504 or the ADA on an issue-by-issue basis in response to a parental complaint.

[23] *Id.* at 373.

[24] In this context, "individual" refers to an issue specific to the parent-child, where "institutional" refers to an alleged district violation that is more generic, such as lack of a grievance procedure or collective notice.

[25] *Id.* at 377.

[26] They reported that parents won in 45.7% and districts in the remaining 54.3% of the court decisions for the period 1978-94. Maloney & Shenker, *supra* note 5, at iii. Moreover, on a disability classification basis, parents were particularly successful when their child had communication disorders (62.5%) and hearing impairments (57.4%), and they were particularly unsuccessful when their child had visual impairments (35.7%) or physical impairments (40.0%). *Id.* at 21-22. However, in addition to the aforementioned (*supra* note 9) problem of missing data, they did not operationally define how they determined wins v. losses; for example, they did not address the classification of inconclusive decisions (e.g., denial of summary judgment) or mixed conclusive decisions (e.g., parents obtained two of four requested years of reimbursement, three of five requested hours/week of occupational therapy on a prospective basis, and compensatory education for one of three requested years).

[27] For whatever reason, she only reported outcomes for residential placements and money damages. Gorn, *supra* note 10, at 10-11 and 20.

SPECIAL EDUCATION DIRECTORS' TOP TEN QUESTIONS
YEAR 2000 AND BEYOND

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1. **Whose job is it anyway?**

IEP components v. Administrative decisions

- IDEA '97 strengthened the role parents in their special education student's education.
    - The parent shall be invited to participate in all placement and eligibility determinations (including determination of necessary additional evaluation data), as well as IEP meetings. 20 U.S.C. § 1414(d)-(f); 34 C.F.R. § 300.501(a)(2); 34 C.F.R. § 300.533(a)(1)-(2); 34 C.F.R. § 300.534(a)(1); 34 C.F.R. § 300.501(c).
    - The concerns of parents and information provided by parents must be considered in developing and reviewing a student's IEP. 34 C.F.R. § 300.343(c)(iii); § 300.346.
- Even with the cooperative intent of IDEA '97, not all decisions are appropriately within the province of the IEP team. For example, it is well established that school districts need not adopt a parent's chosen methodology. See, e.g., Erickson v. Albuquerque Public Schools, 199 F.3d 1116 (31 IDELR 156) (10th Cir. 1999)(Not change in placement to change treatment modality where parent agreed to amount of occupational therapy services); Adams v. State of Oregon, 195 F.3d 1141 (31 IDELR 130) (9th Cir. 1999)(Parents not entitled to reimbursement for private supplemental services obtained because school would not implement a 40 hour per week program that exclusively employed Lovaas-based discrete trial therapy); Dong v. Board of Educ. of the Rochester Community Schools, 197 F.3d 793 (31 IDELR 157) (6th Cir. 1999)(school district is not required to include an expert in the particular teaching methodology preferred by the parents in order to satisfy the requirement to include at an IEP meeting persons knowledgeable about "placement options").
- Personnel
- Staff discipline

2. **Is it something for everyone?**

Identification and new disabilities

- Under IDEA '97, the eligibility team, the group that makes a determination of whether the child is a child with a disability based on upon documented and carefully considered information from a variety of sources, includes the parents and is otherwise comprised of qualified professionals. 34 C.F.R. § 534(a)(1).

- A school district may satisfy its obligations to a student by implementing successful regular education interventions prior to initiating evaluation for special education eligibility. See, e.g., Norton v. Orinda Union Sch. Dist., 1999 WL 97288, 29 IDELR 1068 (9th Cir. 1999). Even though testing showed severe discrepancy between achievement and ability, child did not meet criteria for IDEA eligibility because he was performing adequately within the regular classroom and did not need specialized instruction; P.J. v. Eagle-Union Community Sch. Corp., 31 IDELR 108 (7th Cir. 1999)(A high school student alleged that the School District failed to identify him as a disabled child despite his poor academic performance and social difficulty in a high school setting. Because the School District did contact his parents regarding evaluation and implemented general education interventions it satisfied its requirements under the IDEA. Neither federal nor state regulations required the school to proceed in evaluating the student without parental consent or to seek authority to evaluate him over the parent's opposition).
- **New Disabilities**
    - Bipolar Disorder
    - Oppositional Defiant Disorder
        - DSM-IV defines as a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior toward authority figures that persists for at least 6 months and is characterized by the frequent occurrence of at least four of the following behaviors: losing temper, arguing with adults, deliberately doing things that will annoy other people, blaming others for his or her own mistakes or behavior, being touchy or easily annoyed by others, being angry and resentful, or being spiteful or vindictive. To qualify for ODD the behaviors must occur more frequently than is typically observed in individuals of comparable age and developmental level and must lead to significant impairment in social, academic, or occupational functioning. See e.g., Rome School Committee v. Mrs. B., 2000 WL 762027 (D.Me. 2000)(private psychiatrist diagnosed child as ODD and recommended a behavior management program, which was properly reflected in the IEP)
    - Central Auditory Processing Disorder
        - There is no agreement in the professional literature or practice regarding diagnostic criteria for CAPD; No measures have been established as reliable for purposes of diagnosing CAPD; No validated or reliably documented indices provide conclusive evidence that any treatment for CAPD manifests in improved performance in social or educational endeavors.
        - See e.g. M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ., 2000 WL 1253759 (2d Cir. 2000) (student eligible for special education with a primary

diagnosis of ADHD and secondary diagnosis of CAPD); J.S. v. Norwalk Bd. of Educ., 1999 WL 795553 (D.Conn. 1999) (private psychologist diagnosed student as ADHD and CAPD and recommended special education services, but the school district disagreed and later identified the student as LD, which the Court found was appropriate).

- School Phobia
    - See e.g. Hoffman v. East Troy Community School Dist., 38 F.Supp.2d 750 (E.D.Wis. 1999) (an M-team referral for suspected emotional disturbance may be indicated when certain medical or psychiatric diagnostic statements have been used to describe a child's behavior. Such diagnoses may include but not be limited to autism, schizophrenia, psychoses, psychosomatic disorders, **school phobia**, suicidal behavior, elective mutism or neurotic states of behavior.); Williford Sch. Dist., 29 IDELR 298 (SEA Ark. 1998) (child allowed to receive to receive instruction away from school grounds as a result of school phobia until the district has the opportunity to get a second psychiatric evaluation conducted).

3. Who killed special education/ You want me to do what?

General curriculum and LRE

- Reflecting IDEA '97's emphasis on general curriculum, the student's IEP must include:
    - a statement of the child's present levels of performance, including a statement of how the child's disability affects involvement and progress in the general curriculum 34 C.F.R. § 300.347(a)(1)
    - a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children), or for preschool children, as appropriate, to participate in appropriate activities. 34 C.F.R. §300.347(a)(2)
    - a statement of the related services, supplementary aids, program modifications, and school personnel support necessary to enable the child to be involved and progress in the general curriculum and to be education and participate with other children with disabilities and non disabilities children in extracurricular and other nonacademic activities. 34 C.F.R. § 300.347(a)(3)
- An IEP must be accessible to each regular education teacher, special education teacher, related service provider, and other service provider responsible for its implementation. Each teacher and provider must be informed of his/her specific responsibilities related to implementing the IEP and the specific accommodations, modifications and supports that must be provided for the child in accordance with the IEP. 34 C.F.R. § 300.342(b)(2)-(3).

- The regular education teacher of a child, as a member of the IEP Team, must, to the extent appropriate, participate in the development, review and revision of the IEP, including assisting in the determination of appropriate positive behavioral interventions and strategies for the child and supplementary aids and services, program modifications or supports for school personnel that will be provided for the child. § 300.346(d).
- Professional educators must work cooperatively with parents, but ultimately must make a recommendation based on sound educational reasons beginning the placement inquiry with the regular education setting. Doe v. Arlington, 32 IDELR 58 (4th Cir. 2000)(School district's denial of parents' requested "full inclusion" program upheld because district showed that the placement would not meet the child's "educational needs for core academic subjects, given her significant cognitive limitations and distractibility."; T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572 (3d Cir. 2000)(Parents sought reimbursement for private school tuition for a private daycare center in which they had placed their child after the school system proposed placement in the only preschool class that it operated, composed of ½ disabled children and ½ nondisabled students. The Third Circuit affirmed that the school system's proposal offered FAPE but that it was not in the least restrictive environment, because there was evidence that the student progressed in the daycare program with all nondisabled children. Though school systems are not required to operate preschool programs for nondisabled preschoolers to meet the LRE mandate, alternatives for regular classroom placement for preschoolers must be considered, such as private daycare programs, private schools, Head Start classes, etc.); see also Board of Educ. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ., 184 F.3d 912 (30 IDELR 891) (7th Cir. 1999)(Where school district did not maintain program for nondisabled preschoolers, offer to place child with Down Syndrome in out-of-district program with all disabled preschoolers did not satisfy the mandates of LRE. Thus, parents were entitled to reimbursement for a private preschool).

4. **Is that your final answer?**

IEP process and program offers

- Special education and related services are to be made available in accordance with an IEP "within a reasonable period of time following the agency's receipt of parental consent to an initial evaluation." 34 C.F.R. § 300.343(b).
- While IDEA '97 continues to emphasize cooperation of parents and school districts, if an IEP team cannot cooperatively reach consensus, "the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE." 34 C.F.R. Part 300, Appendix A(II)(9). "[T]he public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing." Id.

- Problems arise, for all parties, when the parent and school district are disagreeing during the IEP process and the school district does not propose a program. Lucht v. Molalla River Sch. Dist., 2000 WL 1239213 (9th Cir. Sept. 5, 2000). Meetings to develop autistic child's IEP, which were ordered by state education department pursuant to state's complaint resolution procedure (CRP) after parents properly initiated complaint under IDEA, were convened as result of an administrative proceeding, so parents were not barred from seeking recovery of attorney fees in connection with those meetings.
- While school districts bear the final responsibility to complete an IEP and offer FAPE, parents have a similar obligation to provide districts with notice of their concerns prior to initiating administrative proceedings. See, e.g., Combs v. School Bd. of Rockingham County, 15 F.3d 357, 362 (4th Cir. 1994)(School district was entitled to rely on parents' acquiescence at IEP meeting. "[T]he School Board, which acted promptly when it heard of the problems, be faulted for failing to make changes earlier. School boards understandably cannot make wholesale and often expensive changes without careful evaluation, and School boards cannot be expected to be clairvoyant.").

5. **So, now it's a family affair?**

Parent training/counseling and other related services

- The regulation provides:[T]he term related services … also includes school health services, social work services in schools, and **parent counseling and training.** 34 C.F.R. § 300.24(a).
- "Parent Counseling and Training": As a related service, the term has been amended to mean, not only assisting parents in understanding the special needs of their child, but also "helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP." 34 C.F.R. § 300.24(7).
- There has been little case law on this provision since the 1999 Regulations were released, however a few SEA decisions have determined that parent counseling or training must be offered, even if the parents don't participate, if it will benefit the child. See, e.g., Wilkes-Barre Area Sch. Dist., 32 IDELR 17 (SEA Pa., May 28, 1999)(Although the district had offered parent training and counseling to the parent on several occasions in the past and the parent did not avail herself of the service, the district was obligated to continue offering the counseling to the parent as a related service in IEP for a 16 year old ninth grade student with LD and ADHD who exhibited defiant and disruptive behaviors); Quaker Valley Sch. Dist., 31 IDELR 255 (SEA Pa., May 14, 1999)(District devised an IEP that focused on emotional support for a gifted 14 year old with emotional disabilities who had difficulty interacting with peers, had threatened his teacher and another student, and had threatened to blow up the school. The district was ordered to offer family counseling since the parents seemed to have a difficult time accepting the degree of their child's disability).

6. **Are we done yet?**

Transition plans/Graduation requirements

- Transition services are a coordinated set of activities designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, employment, independent living, or community participation. Services are individualized based on students' needs, preferences and interests and may include instruction, related services, community experiences, and development of employment and living skills. 34 C.F.R. § 300.29.
- For children age 14 and over (or younger, if determined appropriate by the IEP team), a statement must be included regarding the transition service needs of the student under the components of the IEP than focuses on the student's courses of study (such as AP or vocational classes); for children 16 and over (or younger), a statement must be included regarding the needed transition services including a statement of interagency responsibilities if appropriate. 34 C.F.R. §300.347(b).
- If a participating agency, other than the LEA, fails to provide the transition services described in the IEP, the LEA shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the child set out in that program. 20 U.S.C. § 1414(d)(5).
- FAPE need not be available to student with disabilities who have graduated with a regular high school diploma. However, FAPE must be made available to students of eligible age who have graduated but have not received a regular high school diploma. 34 C.F.R. § 300.122(a)(3); see Woodland Hills Sch. Dist., 30 IDELR 927 (SEA Pa. Jun. 28, 1999)(a mentally retarded student who exceeded the minimum requirements for graduation, but did not complete his IEP goals, was entitled to participate in the graduation ceremony without receiving a diploma so that he might continue working on the IEP goals and diploma until he reached 21); Independent Sch. Dist. No. 281, 32 IDELR 49 (SEA Minn. July 16, 1999)(School district could not unilaterally determine to award student a diploma when parent claimed that the student's graduation was a sham. The district had not provided the required written notice or documentation that the student completed his courses and goals, therefore, he was eligible for additional services, including comp. ed., an IEE and an IEP); Chuchran v. Walled Lake Consol. Schs., 839 F.Supp. 465 (E.D. Mich. 1993) (school district no longer required to offer FAPE to student who, after continuing in special education program for two years after attending graduation exercises with his class, was determined by the IEP team to have completed general graduation requirements, performed exceptionally well in his mainstream classes and achieved his IEP goals).
- Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice. However, a reevaluation is not required for

graduation with a regular high school diploma or termination of eligibility for exceeding the age eligibility under State law. 34 C.F.R. § 300.534(c).

- Because graduation constitutes a change of placement, the school district should convene an IEP meeting to review the student's IEP before graduation to determine whether the child meets graduation requirements. Letter to Anonymous, 22 IDELR 456 (OSEP Nov. 1, 1994).
- Case law permits students to proceed with compensatory education claims despite having graduated. See e.g., Valerie J. v. Derry Coop. School Dist., 771 F.Supp. 483 (D.N.H. 1991) (allowing student seven and one-half months of compensatory education after his high school graduation or 21st birthday, whichever is later); Novator Unified Sch. Dist., 22 IDELR 1056 (SEA Ca. 1995) (finding student eligible for compensatory transition services after graduation based on denial of FAPE prior to graduation).

7. **Didn't we already cover this?**

Section 504

- A person is protected under Section 504 if he or she has a physical or mental impairment which substantially limits one or more major life activities. Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. See T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997)(The "ability to control one's behavior" is a major life activity); Northshore Sch. Dist. No. 417, 20 IDELR 1266 (OCR 1993)(student with "learning deficits" that do not constitute a specific learning disability may be protected under Section 504).
- Section 504's regulations require school districts to provide an "appropriate education" to students with disabilities and recognize that "[i]mplementation of an individualized education program developed in accordance with the [IDEA] is one means of meeting the standard" for satisfying Section 504's requirements. 34 C.F.R. § 104.33(b)(2).
- Section 504 does not provide a cause of action for students to gain access to benefits not already offered by the school district. See, e.g., Alexander v. Choate, 105 S.Ct. 712 (1985)("Section 504 does not require a State to alter [its] definition of the benefit being offered....Nothing in the legislative history of the Act supports such a conclusion. Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal financial assistance."); Shoemaker v. Sch. Bd. of Palm Beach County, No. 97-8036 (S.D. Fla. Nov. 17, 1999)(class action dismissed when plaintiffs alleged discrimination but actually sought creation of behavioral curriculum, additional interventions and supports, and alteration of process of referral to juvenile authorities).

8. **Where's the beef?**

Documentation

- IDEA '97 also provides an opportunity for the parents of a child with a disability the right to inspect and review any educational records relating to their children that are collected, maintained, or used by the educational agency. This right to inspect and review includes—
    - (1) the right to a response from the participating agencies to reasonable requests for explanations and interpretation of the records;
    - (2) the right to request that the agency provide copies of the records
    - (3) the right to have a representative of the parent inspect and review the records. 34 C.F.R. § 300.562.
- Education records are defined as: those records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 C.F.R. § 300.560 (by reference to 34 CFR Part 99 implementing regulations to FERPA).
- Items that do or do not qualify as education records susceptible to parent inspection include:
    - test protocols or question booklet which is separate from the sheet on which the student records his/her answers and which is not personally identifiable to the student (but the test answer sheet is an educational record that the test booklet may be used to explain or interpret)
    - "sole possession records" which are "memory-jogger" type information created and used only by an individual school official or their substitute. 34 C.F.R. § 99.3.
    - Personal notes or teacher papers. see also Letter to Hertzler, 30 IDELR 713 (OSEP 1998).
- FERPA requires that each agency establish appropriate procedures for granting parents access to educational records within a reasonable period of time but in no case more than 45 days after the request has been made.
- School districts must also maintain logs of all persons having access to the records (except the parents and authorized personnel), including the name of the party, the date access was given, and the purpose for which the party was authorized to use the records. 34 C.F.R. § 300.563.

9. **If its broken, who's going to fix it?**

State complaint processes and challenges to states' implementation of IDEA

- To effectuate IDEA's goal of assuring that all children with disabilities have FAPE available to them, Congress placed the ultimate responsibility of compliance on the SEA, declaring that in order for the State to receive federal IDEA funds, the SEA "shall be responsible for assuring that the requirements of this [Act] are carried out...." 20 U.S.C. § 1412(6). See Corey v. Board of Education of the City of Chicago, 27 IDELR 713 (N.D. Ill. 1998).
- To qualify for this assistance, each SEA must submit a plan to the DOE's office of Special Education Programs detailing the state's policies and procedures that assure compliance with

the Act. 20 U.S.C. §§ 1412-1413. See Corey v. Board of Education of the City of Chicago, 27 IDELR 713 (N.D. Ill. 1998).

- State DOE was not primarily at fault for any failure on part of local school district to provide disabled student FAPE as required by IDEA, and could not, as a matter of law, be held liable therefore, in absence of any evidence that DOE failed to exercise due diligence to become aware of district's failure, where student did not bring district's failure to Department's attention until after institution of administrative review proceedings. Gordon v. Board of Education of Howard County, 22 F.Supp.2d 499 (D. Md. 1998).

10. **Is it really worth it?**

Damages

- In regard to remedies for IDEA violations, the statute simply states the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415. The general language of this provision continues to fuel a divide in the courts as to whether damages are available under IDEA.
- "Tort-like damages are simply inconsistent with IDEA's statutory scheme," the court said in Sellers v. School Bd. of Manassas, 141 F.3d 524 (4th Cir. 1998). The conclusion that damages are not allowed has also been reached by the Courts of Appeals for the Sixth, Seventh, Eighth and Ninth Circuits. See Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 286-387 (6th Cir. 1992); Charlie F. v. Board of Educ. of Skokie Sch. Dist., 98 F.3d 989, 991 (7th Cir. 1996); Heideman v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996); Shevtsov v. Los Angeles Unified Sch. Dist., 27 IDELR 1133, 135 F.3d 379 (9th Cir 1998).
- Other courts have reasoned that the open-endedness of the statutory language requires the allowance of such damages. See W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995), the court stated their contention that, unless expressly barred, all remedies should be available to the court. "Although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies, unless Congress has expressly indicated otherwise." Id.
- Due to this split, litigants seeking financial awards frequently pursue claims under other statutes, Section 504 and Section 1983. In some cases, the courts have permitted these cases to go forward without the traditional requirement that the litigants first exhaust their administrative remedies. See, e.g., Witte v. Clark County Sch. Dist., 197 F.3d 1271, 31 IDELR 128 (9th Cir. 1999)(Parent not required to exhaust administrative remedies prior to bringing federal court case under § 1983, Section 504 and the ADA for money damages for alleged physical and emotional abuse suffered by her son at a separate school for children with disabilities. Where parent is seeking only money damages, which are not available under the IDEA, exhaustion is not required.).

Preventing School Desegregation Decrees from Becoming Barriers to Charter School Innovation

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PREVENTING SCHOOL DESEGREGATION DECREES FROM BECOMING BARRIERS TO CHARTER SCHOOL INNOVATION

Preston C. Green, III

Critics have claimed that our public educational system has failed to develop innovative ideas, attract exceptional teachers, or hold incompetent teachers and administrators accountable for their students' inability to learn.[1] Thirty-six states,[2] the District of Columbia,[3] and Puerto Rico[4] have attempted to address these problems through the creation of charter schools. Charter schools are autonomous, or semi-autonomous, public schools that are created by a contract, or charter, between the school's organizers and a sponsor, usually the state's department of education or a local school district.[5] The creators of charter schools are held accountable for achieving educational results. In return, the charter school receives waivers exempting it from many of the restrictions that apply to traditional public schools.[6]

Many observers fear that charter schools will provide school officials the means to help white parents escape from racially desegregated public schools.[7] Several states have responded to this concern in their statutes by requiring charter schools to comply with court-ordered school desegregation decrees.[8] Statistical evidence, however, does not support the concern that charter schools will lead to white flight: few charter schools have a disproportionately high percentage of white students.[9] By contrast, there has been a relatively high percentage of predominantly minority charter schools.[10]

This article asserts that school desegregation decrees might have the ironic effect of preventing the development of charter schools that meet the needs of minority students. To address this concern, charter school statutes should permit sponsors to request a federal district court to modify a desegregation decree if the sponsor approves an application that would violate the decree. These provisions would be consistent with legal decisions authorizing a federal district court to modify desegregation decrees. In addition, decree modification provisions would expose neither the state nor the sponsor to an Equal Protection Clause challenge.

The first section provides an overview of the charter school movement. The second section analyzes the debate surrounding predominantly minority charter schools. The third section examines pertinent legal decisions to show that state statutes may permit charter school sponsors to request a modification of a desegregation decree. The final section explains how such statutory provisions would expose neither the state nor charter school sponsors to Equal Protection Clause objections.

SECTION I: OVERVIEW OF THE CHARTER SCHOOL MOVEMENT

In 1983, the National Commission of Excellence warned in its influential report, *A Nation at Risk*, that the public schools were failing their mission to educate students by creating a "rising tide of mediocrity that threatens our very future as a Nation and a people."[11] Charter schools were part of a wave of educational reforms designed to remedy the perceived inadequacy of the public schools.[12] Supporters believe that charter schools would encourage competition, provide new models of schooling, and create incentives to improve the public schools.[13] The federal government has also provided financial support to the charter school movement through several statutes.[14]

The particulars regarding how and under what circumstances a charter school may be established vary from state to state. Even with this variability, however, charter schools have several characteristics in common. States relieve charter schools of certain state laws and regulations in exchange for the charter school's commitment by means of a contract to achieve specific outcomes.[15] Charter schools may not charge tuition, but utilize per pupil state aid dollars to fund their efforts.[16] Schools must outline their mission and curricular focus and undergo a review process to determine whether they have sufficiently outlined their program to qualify for charter school status.[17] Once those proposing a school have adequately justified their educational plan to the sponsor, they must enter into a contract to deliver those services to the children who will elect to attend.[18] If the charter school fails to meet its goals, it must develop an educational plan in which it explains how it will accomplish the goals of the charter.[19] If the charter school still fails to accomplish the goals established in the charter, the sponsor may revoke the charter.[20]

SECTION II: THE CHARTER SCHOOLS AND RACE

Many observers fear that public officials will use charter schools to enable white parents and students to escape from desegregated public schools.[21] This concern has a historical basis: after the Supreme Court had outlawed separate-but-equal education in *Brown v. Board of Education*,[22] segregationists proposed school choice programs to circumvent school desegregation efforts.[23] To protect school desegregation policies, 10 states –

Arizona,[24] Colorado,[25] Delaware,[26] Illinois,[27] Louisiana,[28] Nevada,[29] North Carolina,[30] Ohio,[31] Oklahoma,[32] Pennsylvania,[33] and Virginia[34] – require charter schools to comply with court-ordered school desegregation decrees.

Statistical evidence does not seem to support the concern that charter schools will lead to white flight. A study of 16 charter school states, funded by the United States Department of Education, found that only four percent of the charter schools in the sample were disproportionately white: that is, served 20 percent more white students than the districts in which they were located.[35] However, the study also found that: (1) one out of three charter schools had a disproportionate percentage of minority students;[36] and (2) approximately 40 percent of charter schools that enrolled predominantly African-American students were located in districts where the average white enrollment was more than 50 percent.[37]

There may be several reasons for the high percentage of predominantly minority charter schools. First, the African-American community has become increasingly disenchanted with traditional, desegregated public schools. Black students in desegregated schools are more likely to be placed in special education programs or lower educational tracks than their white counterparts.[38] They are also more likely to be expelled or suspended from school.[39] Many African-Americans have become supportive of charter schools because such schools will provide them with the opportunity to design educational programs that specifically address their needs, without compromising on accountability.[40]

Second, charter school statutes create incentives to design educational programming that will benefit minority students. For example, the statutes of several states encourage proposals to focus on the needs of "at risk" students. Colorado,[41] Illinois,[42] New York,[43] and North Carolina[44] give preference to charter school proposals that serve at-risk children, while Oregon[45] provides grants and loans to charter schools that serve this population.

Third, many charter schools that are attractive to minorities have experienced a difficult time convincing white parents to enroll their children.[46] There may be several explanations for this inability to recruit whites. Some white parents may not be educationally interested in charter schools that have educational themes that are attractive to minority students.[47] Additionally, some white parents may fear the neighborhoods in which some minority-theme charter schools are located.[48]

Ironically, rigid enforcement of desegregation decrees might actually prevent the creation of charter schools that meet the educational needs of minority communities. For example, in Baton Rouge, Louisiana, the

Justice Department challenged the opening of the United Charter School. This 650-student charter school would have been 80 percent black.[49] In Pinellas County, Florida, the school board rejected a proposal for Marcus Garvey Academy, a charter school that would have targeted 45 children from disadvantaged backgrounds because the school's percentage of black students would have been too high, in violation of a desegregation decree.[50]

To prevent the restriction of educationally innovative ideas, charter school statutes should permit sponsors to request a federal district court to modify a desegregation decree if the sponsor approves an application that would violate the decree. Decree modification provisions would not prevent the development of innovative ideas. Such provisions would have the additional benefit of ensuring that charter schools are not being developed to sidestep desegregation decrees.

SECTION III: DESEGREGATION DECREE MODIFICATION PROVISION AND APPLICABLE LEGAL DECISIONS

Supreme Court Decisions

The previous section called for charter school statutes to permit sponsors to request a modification of a desegregation decree in federal district court, if sponsors approve an application that would violate such a decree. These statutory provisions would be consistent with legal decisions permitting a federal district court to modify a decree if other important educational objectives are met. The starting point for this analysis is *Green v. County School Board of New Kent County, Virginia*.[51] In *Green*, the Supreme Court struck down a freedom-of-choice plan, consisting of two public schools, one white and one black. The plan had been ineffective: during its three-year existence, no white student had ever chosen to attend the black school.[52] The Court found that school districts must "come forward with a plan that promises realistically to work, and promises realistically to work *now*."[53] The Court also explained that the existence of more promising actions places a "'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends."[54] Thus, *Green* permits the existence of predominantly minority charter schools in *de jure* segregated school districts upon the establishment of important educational interests.

The only other Supreme Court case to examine the "heavy burden" of school districts, *Wright v. Council of the City of Emporia*,[55] found that the school district did not meet its burden. However, *Wright* does not forbid a charter school statute from authorizing sponsors to seek modifications of desegregation decrees. In *Wright*, Emporia, Virginia had changed from "town" to "city" status, thus obtaining independence from surrounding Greensville County. Emporia agreed to continue an arrangement, antedating its change of status, to use the county public school system. A 1965 desegregation suit led to a court-ordered freedom-of-choice desegregation plan for the Greensville County schools, including those within the city of Emporia. After the Supreme Court had questioned the constitutionality of such plans in *Green*, the court modified its decree and ordered the pairing of certain schools. The city of Emporia then announced its intention to operate a separate school system and sought to terminate its agreement with the county. Such action would have resulted in a "substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools."[56]

The city of Emporia tried to satisfy its heavy burden for proposing a more segregative plan by arguing that: (1) a separate system would achieve quality education for city residents; and (2) it was unfair to force the city to continue sending its children to schools over which the city had little control. The Court rejected both assertions. It noted that only city officials, who represented one-third of students being desegregated, had claimed that a separate system would improve the quality of education.[57] The county had adopted a resolution stating its belief that the city's actions were not in the best interests of the county's children.[58] Also, one month before the separate system was to open, the Court found that "the city had no buildings under lease, no teachers under contract, and no specific plans for the operation of the schools."[59] As for the city's local control claim, the Court acknowledged that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."[60] However, the city had found its arrangement with the county to be both feasible and practical up until the time of the district court's desegregation decree.[61]

It is important to note that *Wright* does not does not prohibit a charter school statute from authorizing sponsors to seek modifications of desegregation decrees. In ruling against the city, the Court implied that Emporia had not accounted for the educational interests of all the children affected by its decision to operate a separate school system. The Court also implied that Emporia had not been committed to addressing the *de jure* segregation that had occurred within the school system. By contrast, a court might look more favorably on the thoughtfully presented actions of a school district that had acted in good faith over the years to adhere to the requirements of a desegregation decree.

Lower Court Decisions

Flax v. Potts[62] shows that a court might more readily permit a modification, if a school district has consistently sought to satisfy the requirements of a desegregation decree. Additionally, *Flax* identifies several educational interests that sponsors can assert in seeking such modification.[63] In 1973, the Northern District of Texas ordered the Fort Worth, Texas school district to implement a desegregation plan, pairing all-black schools with predominately white schools.[64] In 1983, the plan was modified so that second and third grade students, constituting two percent of the school district's student body, were bused for desegregation purposes.[65] In 1987, the district court terminated the busing policy, even though such action would cause "an immediate but temporary increase by more than ten percent in the number of students of the predominant race" in several schools.[66] The district court ruled in this manner because Fort Worth had provided sufficient justification for altering the desegregation plan.[67]

The Fifth Circuit upheld the lower court's decision. The court observed that Fort Worth had implemented its desegregation plan for 15 years and was close to unitary status.[68] As the court explained: "How close the school is to unitary status is a legitimate consideration in deciding whether a modification should be allowed. The necessity for strong, unyielding steps is greatest at the outset, and once the vestiges of segregation have been largely eliminated, school districts should be given more deference to pursue legitimate educational goals."[69] The Fifth Circuit also noted that the busing policy affected only two percent of the student body within the district.

The court then found that the resegregative effect of the cessation of busing was outweighed by four factors. First, continued busing would have had a negative effect on neighborhood integration that had already occurred by transporting "black students out of integrated areas into predominantly black schools, and white students out of predominantly black schools into schools where their race is in the majority."[70] Second, the existence of neighborhood schools permitted a greater degree of local control.[71] Third, neighborhood schools could improve the quality of education in the school district because "where there is less time spent on transportation to and from school, more time is allowed for extra-curricular activities and parental involvement."[72] Also, educational quality would be improved because "the money saved from the termination of busing [would] be spent on the primarily minority schools."[73] Fourth, Forth Worth's white population had begun to stabilize after the neighborhood school policy was implemented in 1983. Therefore, the neighborhood school policy was more likely in the long run to increase integration than the terminated busing policy.[74]

Analysis of Desegregation Decree Modification Provisions

As the previous subsections demonstrate, caselaw would support a charter school statute authorizing sponsors to seek modification of desegregation decrees, if sponsors approve charter schools that would violate such decrees. *Flax* suggests that federal district courts may grant deference to sponsors in *de jure* segregated school districts that have operated comprehensive desegregation decrees for a considerable length of time and are close to unitary status. Many *de jure* school districts fit these criteria. *Flax* also indicates that courts may approve educational policies that violate the desegregation order, if the policies do not affect a large number or students. Charter schools generally satisfy this criterion as well. During the 1996-97 school year, it was estimated that charter schools enrolled about 0.5 percent of public school population.[75]

Flax identifies three legitimate educational interests that sponsors may assert to support the approval of charter schools that may violate school desegregation decrees: (1) encouraging local control; (2) improving educational quality; and (3) reducing racial isolation. The Supreme Court explained in *Milliken v. Bradley* that: "[n]o single tradition in public education is more deeply rooted than local control over the operation of the schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[76] Charter schools are consistent with this tradition. They encourage local control by providing parents and other community stakeholders the opportunity to become involved in the educational governance and decision-making process.[77] Additionally, charter schools empower parents to "help devise the programs that most easily fit the practical, emotional, and educational needs of their children."[78]

Sponsors may also assert that charter schools improve the educational quality within a school district by encouraging the development of smaller schools. It is estimated that 60 percent of all charter schools enroll fewer than 200 students, and that 35 percent of these schools have fewer than 100 students. By contrast, 16 percent of all public schools in states with charter schools enroll fewer than 200 students, and nine percent enroll fewer than 100 students.[79] A compelling body of educational research demonstrates that students derive several advantages by attending small, intimate learning communities.[80] Small schools tend to have higher levels of student participation, and parental satisfaction than large schools.[81] Also, smaller schools have a greater sense of community, and lower dropout rates than large schools.[82] Moreover, small schools have had a measurably positive impact on inner-city students, particularly those from minority and low-income families.[83]

Paradoxically, sponsors may argue that charter schools may actually help to reduce racial isolation in inner-city school districts. White middle-class students have already left inner-city school districts for the suburbs.[84] As Paul Peterson observes: "Those who are going to be left behind already are."[85] However, if a city offers a wider variety of educational choices, including charter schools, middle-class parents may be more likely to return to live in the city. Peterson makes precisely this argument in the context of private school vouchers:

> With opportunities to choose among a variety of schools, young parents with children entering school will forgo the expensive move to the suburb and pick instead a local school suited to their needs. Other families will give up their suburban homes for better schools in the central city and homes closer to their job. Businesses will open up schools so their employees can bring their children with them on their daily commute. The central-city economy picks up, property values rise, racial integration increases, and central-city test scores rise.[86]

Thus, sponsors can assert that charter schools are an integral part of an educational plan designed to encourage desegregation by increasing the array of educational options within the district.

SECTION IV: DESEGREGATION DECREE MODIFICATION PROVISION AND EQUAL PROTECTION CLAIMS

Supreme Court Decisions

A statutory provision authorizing a charter school sponsor to seek modification of a desegregation decree in federal district court would expose neither the state nor the sponsor to an Equal Protection Clause challenge. The Equal Protection Clause protects against, among other things, racial classifications by the government.[87] Governmental classifications that are based on race are subject to strict scrutiny. Such classifications must do the following: (1) satisfy a compelling governmental interest; and (2) be narrowly tailored to further that interest.[88] Plaintiffs would probably argue that the state committed unconstitutional racial discrimination by permitting the existence of charter schools that violate desegregation decrees. Plaintiffs would also argue that sponsor violated the Equal Protection Clause by chartering a proposal that would have violated a desegregation decree, and seeking a modification of the decree.

The plaintiffs' case would be made difficult because an equal protection violation does not arise solely because several charter schools have a disproportionately high percentage of members from one racial group. As the Supreme Court explained in *Washington v. Davis*,

> Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.[89]

Rather, plaintiffs would have the burden of showing that either the state or the charter school sponsor acted with the intent to create schools that would violate a desegregation decree.[90]

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court stated: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[91] Factors for making such determination may include the following: (1) disproportionate impact;[92] (2) the historical background of the challenged decision;[93] (3) specific events leading up to the challenged decision;[94] (3) departures from normal procedures;[95] and (4) legislative or administrative history.[96]

Analysis of Desegregation Modification Provisions

The state should be able to overcome an attempt to establish that it acted with discriminatory intent in adopting the desegregation decree modification provision. Because the state has sovereign immunity under the Eleventh Amendment,[97] it would have to consent to a private lawsuit through a waiver of its right to sovereign immunity.[98] If the state consented to be sued, it could argue that it is advancing other legitimate educational interests, such as promoting local control, encouraging educational innovation, and reducing racial isolation. Also, the state could identify other statutory provisions that demonstrate that it had not acted with discriminatory intent. For example, several states forbid the admissions policies of charter schools to discriminate on the basis of race.[99] Nine states require the population of charter schools to reflect the racial and ethnic composition of the surrounding school districts.[100] Thus, a state should be able to convince a court that it did not act with discriminatory intent in adopting the desegregation decree modification provision.

A charter school sponsor should be able to defeat a claim that it acted with discriminatory intent in: (1) granting a charter to a proposal that would violate a desegregation decree; and (2) seeking a modification of the decree. The sponsor would overcome such a claim by showing that its decision was based upon the educational value of the charter school proposal. Charter school statutes require proposals to provide a variety of data for assessing the proposal's educational value, including the proposed school's educational program, pupil performance standards, and governance structure.[101] By demonstrating that it granted a charter based on these educational factors, a sponsor would convince a court that it did not act with discriminatory intent.

CONCLUSION

This article has asserted that charter school statutes should authorize sponsors to request a federal district court to modify a desegregation decree if the sponsor approves a proposal that would violate the decree. Such provisions would prevent sponsors from using charter schools to circumvent desegregation decrees, while enabling the development of educational ideas that satisfy the needs of minority communities. Decree modification provisions would be consistent with legal decisions authorizing a court to grant modifications, upon the demonstration of other legitimate, educational interests.

Furthermore, decree modification provisions would expose neither the state nor sponsors to Equal Protection Clause challenges. To establish an equal protection claim, plaintiffs would try to prove either that: (1) the state acted with discriminatory intent in adopting the decree modification provision; or (2) the sponsor acted with discriminatory intent in chartering a proposal that would violate a desegregation decree, and seeking a modification of the decree. Plaintiffs would probably be unable to prove such intent.

ENDNOTES

[1] JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION (1996).

[2] (1) Alaska, ALASKA STAT. §§ 14.03.250–.290 (LEXIS through 1999 1st Sess.); (2) Arizona, ARIZ. REV. STAT. §§ 15-181–15-189.03 (LEXIS through 2nd Spec. Sess. of 44th Legis.); (3) Arkansas, ARK. CODE ANN. §§ 6-23-101–507 (LEXIS through 1999 Supp.); (4) California, CAL. ED. CODE §§ 47600– 47664 (Deering, LEXIS through 1999 Legis. Sess.); (5) Colorado, COLO. REV. STAT. §§ 22-30.5-101 – 209 (LEXIS through 1999 Legis. Sess.); (6) Connecticut, CONN. GEN. STAT. §§ 10-66aa—gg (LEXIS through all 1997-98 Legis. Sess.); (7) Delaware, DEL. CODE ANN. tit.14, §§ 501—516 (LEXIS through 1999 1st Spec. Sess. of 140th Gen. Ass.); (8) Florida, FLA. STAT. chs. 228.056—.058 (LEXIS through 1999 Legis. Sess.); (9) Georgia, GA. CODE §§ 20-2-2060– 2071 (LEXIS through 1999 Gen. Ass.); (10) Hawaii, HAW. REV. STAT. §§ 302A-1181—1188 (Michie, LEXIS through 1999 Reg. Sess.); (11) Idaho, IDAHO CODE §§ 33-5201—5212 (LEXIS through 1st Reg. Sess. of 55th Legis.); (12) Illinois, 105 ILL. COMP. STAT. §§ 5/27A-1—5/32-2.13 (LEXIS through 1999 Reg. Sess.); (13) Kansas, KAN. STAT. ANN. §§ 72-1903—1910 (LEXIS through 1999 Legis. Sess.); (14) Louisiana, LA. REV. STAT. §§ 17:3971—4001 (LEXIS through 1999 Legis. Sess.); (15) Massachusetts, MASS. ANN. LAWS ch. 71 § 89 (LEXIS through 1999 Legis. Sess.); (16) Michigan, MICH. COMP. LAWS §§ 380.501—518 (LEXIS through 1999 Ch. 107, Jul. 7, 1999); (17) Minnesota, MINN. STAT. §§ 124D.10—.11 (LEXIS through 1999 Legis. Sess.); (18) Mississsippi, MISS. REV. STAT. §§ 37-28-1—21 (LEXIS through 1999 Reg. Sess.); (19) Missouri, MO. REV. STAT. §§ 160.400—.420 (LEXIS through 1st Reg. Sess. of 90th Gen. Ass.); (20) Nevada, NEV. REV. STAT. ANN. §§ 386.500—.610 (LEXIS through 1999 Legis. Sess.); (21) New Hampshire, N.H. REV. STAT. ANN. §§ 194-B:1—22 (LEXIS through Ch. 350 of 1999 Sess. of Gen. Ct.); (22) New Jersey, N.J. STAT. §§ 18A:36A-1—18 (LEXIS through P.A. 1999, Ch. 155); (23) New Mexico, N.M. STAT. ANN. §§ 22-8B-1—8C-7 (LEXIS through 1999-NMCA-158 and 1999-NMSC-044.); (24) New York, N.Y. C.L.S EDUC. §§ 2850—2857 (LEXIS through 1999 Ch. 644, Nov. 30, 1999); (25) North Carolina, N.C. GEN. STAT. §§ 115C-238.29A—K (LEXIS through 1999 Extra Sess.); (26) Ohio, OHIO REV. CODE ANN. §§ 3314.01–.020 (Anderson, LEXIS through Nov. 1, 1999); (27) Oklahoma, 70 OKLA. STAT. §§ 3-130—152 (LEXIS through 1998 2nd & 1999 1st Ext. Sess.); (28) Oregon, 1999 Or. Laws 200 (Information for Public Affairs, LEXIS through 70th Legis. Sess.); (29) Pennsylvania, 24 PA. STAT. §§ 17-1701-A—1732-A (LEXIS through all 1998 legislation); (30) Rhode Island, R.I. GEN. LAWS §§ 16-77-2—77-1.5 (LEXIS through Jan. 1999 Sess.); (31) South Carolina, S.C. CODE ANN. §§ 59-40-10—190 (LEXIS through 1998 Supp.); (32) Texas, TEX. EDUC. CODE §§ 12.101—.118 (LEXIS through 1999 Legis. Sess.); (33) Utah, UTAH CODE ANN. §§ 53A-1a-501—514 (LEXIS through 1999 Gen. Sess.); (34) Virginia, VA. CODE ANN. §§ 22.1-212.5—.15 (LEXIS through 1999 Reg. Sess.); (35) Wisconsin, WIS. STAT. § 118.40 (LEXIS through Act 25, Dec. 20, 1999); (36) Wyoming, WYO. STAT. ANN. §§ 21-3-201—207 (LEXIS through 1999 Reg. Sess.).

[3] D.C. CODE ANN. §§ 31-2801—2853.25 (LEXIS through Apr. 27, 1999).

[4] P.R. LAWS ANN. tit. 18, §§ 2501—2585 (LEXIS through 1999 Supp.).

[5] NATHAN, *supra* note 1.

[6] *Id.*

[7] David J. Dent, *Diversity Rules Threaten North Carolina Charter Schools that Aid Blacks*, N.Y. TIMES, Dec. 23, 1998, at B8. Nationwide, there are more than 500 school districts are under federal court supervision to end their practice of *de jure*, or official, segregation. Nineteen charter school states have at least one school district that is under federal district court supervision to end its segregative practices. *Charter Hypocrisy*, WALL ST. J., Oct. 20, 1999, at A26.

[8] *See infra* notes 24-34 and accompanying text.

[9] RPP INT'L, A NATIONAL STUDY OF CHARTER SCHOOLS: SECOND-YEAR REPORT (1998).

[10] *Id.*

[11] DAVID P. GARDNER, ET AL., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM. AN OPEN LETTER TO THE AMERICAN PEOPLE. A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION 5 (1983).

[12] Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 BYU EDUC. & L. J. 69 n.2 (1998).

[13] NATHAN, *supra* note 1.

[14] State educational agencies may use part of the money received under the Goals 2000: Educate America Act for the promotion of charter schools. 20 U.S.C.S. § 5888 (LEXIS through Dec. 3, 1999). Title I of the Improving America's Schools Act of 1994 also seeks to encourage the development of charter schools through financial assistance, and evaluative studies. 20 U.S.C.S. §§ 8061—8067 (LEXIS through Dec. 3, 1999). President William Clinton, in his State of the Union Address, called for the creation of 3,000 charter schools by the twenty-first century. W. Clinton, State of the Union Address (Feb. 4, 1997).

[15] Julie F. Mead & Preston C. Green. *Making Promises: Have Charter Schools Resurrected Educational Malpractice as a Cause of Action?* Paper presented at the annual meeting of the American Educational Research Association, Montreal, April 22, 1998 (1998) (paper on file with the author).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Dent, *supra* note 7.

[22] 347 U.S. 483 (1954).

[23] Stephen Eisdorfer, Colloquium, *Racial Ceilings and School Choice: Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937 (1993).

[24] ARIZ. REV. STAT. § 15-184(D) (LEXIS through 2nd Spec. Sess. of 44th Legis.) ("A charter school shall admit pupils who reside in the attendance area of a school or who reside in a school district that is under a court order of desegregation or that is a party to an agreement with the United States department of education office for civil rights directed toward remediating alleged or proven racial discrimination unless notice is received from the resident school that the admission would violate the court order or agreement. If a charter school admits a pupil after notice is received that the admission would constitute such a violation, the charter school is not allowed to include in its student count the pupils wrongfully admitted.").

[25] COLO. REV. STAT. § 22-30.5-104(3) (LEXIS through 1999 Legis. Sess.) ("A charter school shall be subject to any court-ordered desegregation plan in effect for the school district.").

[26] DEL. CODE ANN. tit.14, § 506(5) (LEXIS through 1999 1st Spec. Sess. of 140th Gen. Assembly) ("A charter school shall not . . . [b]e formed to circumvent a court-ordered desegregation plan.").

[27] 105 ILL. COMP. STAT. 5/27A-4(a) (LEXIS through 1999 Reg. Sess.) ("The General Assembly does not intend to alter or amend the provisions of any court-ordered desegregation plan in effect for any school district.").

[28] LA. REV. STAT. § 17:3991(C)(3) (LEXIS through all 1999 Legis. Sess.) ("A charter school shall . . . [b]e subject to any court-ordered desegregation plan in effect for the city or parish school system.").

[29] NEV. REV. STAT. ANN. § 386.550(4) (LEXIS through 1999 Legis. Sess.) ("A charter school shall . . . [c]omply with any plan for desegregation ordered by a court that is in effect in the school district in which the charter school is located.").

[30] N.C. GEN. STAT § 115C-238.29F(g)(5)(ii) (LEXIS through 1999 Extra Sess.) ("The [charter] school shall be subject to any court-ordered desegregation plan in effect for the local school administrative unit.").

[31] OHIO REV. CODE ANN § 3314.06 (Anderson, LEXIS through Nov. 1, 1999) ("[I]n the event the racial composition of the enrollment of the community school is violative of a federal desegregation order, the community school shall take any and all corrective measures to comply with the desegregation order.").

[32] 70 OKLA. STAT. § 3-140(B) (LEXIS through 1998 2nd & 1999 1st Extra Sess.) ("A charter school shall admit students who reside in the attendance area of a school or in a school district that is under a court order of desegregation or that is a party to an agreement with the United States Department of Education Office for Civil Rights directed towards mediating alleged or proven racial discrimination unless notice is received from the resident school district that admission of the student would violate the court order or agreement.").

[33] 24 PA. STAT. § 17-1730-A (LEXIS through 1998 Legis. Sess.) ("The local board of school directors of a school district which is operating under a desegregation plan approved by the Pennsylvania Human Relations Commission or a desegregation order by a Federal or State court shall not approve a charter school application if such charter school would place the school district in noncompliance with its desegregation order.").

[34] VA. CODE ANN. § 22.1-212.6 (A) (LEXIS through 1999 Reg. Sess.) ("A charter school shall be subject to . . . any court-ordered desegregation plan in effect for the school division.").

[35] RPP INT'L, *supra* note 9, at 56.

[36] *Id.* at 72.

[37] *Id.* at 64.

[38] Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 (1995).

[39] Robin D. Barnes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375 (1997).

[40] *Id.*

[41] COLO. REV. STAT § 22-30.5-109(3) (LEXIS through 1999 Legis. Sess.) ("It is the intent of the general assembly that priority of consideration be given to charter school applications designed to increase the educational opportunities of at-risk pupils.").

[42] ILL. COMP. STAT. § 5/27A-8(3)(LEXIS through 1999 Reg. Sess.) ("In evaluating any charter school proposal submitted to it, the local school board shall give preference to proposals that . . . are designed to enroll and serve a substantial proportion of at-risk children.").

[43] N.Y. C.L.S EDUC. § 2852(2)(c) (LEXIS through 1999 1999 Ch. 557) ("In reviewing applications, the charter entity is encouraged to give preference to applications that demonstrate the capability to provide comprehensive learning experiences to students identified by the applicants as at risk of academic failure.").

[44] N.C. GEN. STAT. § 115C-238.29C(b)(iii) (LEXIS through 1999 Extra Sess.) ("In reviewing applications for the establishment of charter schools within a local school administrative unit, the chartering entity is encouraged to give

preference to applications that demonstrate the capability to provide comprehensive learning experiences to students identified by the applicants as at risk of academic failure.").

[45] 1999 Or. Laws 200 (Information for Public Affairs, LEXIS through 70th Legis. Sess.) ("Pursuant to rules adopted by the State Board of Education, the Department of Education shall award grants and loans on the basis of need. Priority for awarding grants and loans shall be to those public charter schools serving at-risk youth.").

[46] In Durham, North Carolina, the Healthy Start Academy, a charter school located in a black neighborhood, was able to attract only two white students, even after engaging in an intense recruitment process. Dent, *supra* note 7.

[47] For example, Harvest Preparatory School, a Minneapolis charter school, combines an Afrocentric curriculum with an emphasis on basic skills. John Ramsay, *A direct challenge; An Irresistible Question Presented Itself as an Educator Studied an Urban School's Highly Touted, But Controversial, Reading Program: Would It Work for His Preschooler?*, STAR TRIBUNE (Minneapolis), Jul. 9, 1998.

[48] Stephan Thernstrom & Abigail Thernstrom, AMERICA IN BLACK AND WHITE 258 (1997) (discussing white fear of black neighborhoods).

[49] *Charter Hypocrisy*, *supra* note 7.

[50] *Id.*

[51] 391 U.S. 430 (1968).

[52] *Id.* at 441.

[53] *Id.* at 439 (emphasis by the Court).

[54] *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (citing *Green*, 491 U.S. at 439).

[55] 407 U.S. 451 (1972).

[56] *Id.* at 463.

[57] *Id.* at 467.

[58] *Id.*

[59] *Id.* at 468.

[60] *Id.* at 469.

[61] *Id.*

[62] 864 F.2d 1157 (5th Cir. 1989).

[63] The only published case to address a federal district court's approval of a charter school that would violate a school desegregation decree is *Berry v. School District of Benton Harbor*, 56 F. Supp. 2d 866 (W.D.Mich. 1999). The Western District of Michigan refused to permit the opening of a charter school because the school had failed to provide adequate assurance that it would not adversely affect a desegregation decree, which had been in effect since 1981. However, the court did not address the issue of whether legitimate reasons existed for altering the decree.

[64] *Id.* at 1158.

[65] *Id.* at 1158-59.

[66] *Id.* at 1159.

[67] *Id.* at 1159-60.

[68] *Id.* at 1160.

[69] *Id.* at 1160 n.9.

[70] *Id.* at 1161.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] RPP INT'L, *supra* note 9, at 36.

[76] 418 U.S. 717, 741-42 (1974).

[77] Barnes, *supra* note 39, at 2404.

[78] *Id.* at 2405.

[79] *Id.* at 37.

[80] Michael Klonsky, *Small Schools: The Numbers Tell a Story. A Review of the Research and Current Experiences* (1995) (ERIC Document Reproduction No. 386 517).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Paul E. Peterson, *School Choice: A Report Card*, 6 VA. J. SOC. POL'Y & L. 47, 79 (1998).

[85] *Id.* at 79.

[86] *Id.* at 80.

[87] The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1.

[88] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995).

[89] *Washington v. Davis*, 426 U.S. 229, 242 (1976).

[90] *Village of Arlington Heights v. Metropolitan Development Housing Corp.*, 429 U.S. 252, 265 (1977).

[91] *Id.* at 266.

[92] *Id.*

[93] *Id.* at 267.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 268.

[97] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend. XI.

[98] *Clark v. Barnard*, 108 U.S. 436 (1883).

[99] *E.g.* (1) Arizona, ARIZ. REV. STAT. § 15-184B (LEXIS through 2nd Spec. Sess. of 44th Legis.); (2) Arkansas, ARK. CODE ANN. § 6-23-106(6) (LEXIS through 1999 Supp.); (3) California, CAL. ED. CODE § 47605(d)(1) (Deering, LEXIS through 1999 Legis. Sess.).

[100] (1) California, CAL. EDUC. CODE § 47605(b)(5)(G) (Deering, LEXIS through 1999 Legis. Sess.); (2) Florida, FLA. STAT. § 228.056(9)(a)(8) (LEXIS through 1999 Legis. Sess.); (3) Kansas, KAN. STAT. ANN. § 72-1906(d)(2) (LEXIS through 1999 Legis. Sess.); (4) Minnesota, MINN. STAT. § 124D.10 Subdiv. 9(3) (LEXIS through 1999 Legis. Sess.); (5) Nevada, NEV. REV. STAT. § 386.580(1) (LEXIS through 1999 Legis. Sess.); (6) North Carolina, N.C. GEN. STAT. § 115C-238.29F(g)(5)(ii) (LEXIS through 1999 Extra Sess.); (7) South Carolina, S.C. CODE ANN § 59-40-50(B)(6) (LEXIS through 1998 Supp.); (8) Wisconsin, WIS. STAT. § 118.40(b)(9) (LEXIS through Act 25, Dec. 20, 1999); (9) Wyoming, WYO. STAT. ANN. § 21-3-203(b)(vii) (LEXIS through 1999 Reg. Sess.).

[101] *See e.g.*, COLO. REV. STAT. § 22-30.5-106 (LEXIS through 1999 Legis. Sess.).

Collegiality as a Factor in Tenure Decisions

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I. Introduction

Higher education relies on the tenure process to determine whether "a candidate will fit into the future of the academic unit." Goodisman v. Lytle, 724 F.2d 818, 821 (9th Cir. 1984). Tenure falls within the broad concept of academic freedom, which, although originally formulated to protect faculty from outside pressure, has taken on economic and governance aspects to mean "a long-term academic and financial commitment by a university to and individual, providing faculty with unusually secure positions tantamount to life contracts." (Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981)).

The formal tenure process is a multi-year review that focuses on a candidate's scholarship, teaching, and service (although these three elements frequently will not have equal value). Although tenure decisions become critical in the final up-or-out decision year (frequently the sixth year), a nontenured faculty member could be nonrenewed at any point if reviewers do not consider the faculty member to be meeting the university's requirements (for purposes of this presentation, decisions involving "collegiality" made at any point in the multi-year tenure process will be reviewed). Differences between reviewers and the candidate as to the interpretation of these three tenure categories result in considerable litigation, but reviewers may also look to a "person's ability and willingness to work effectively with his or her colleagues." (McGill v. Regents of University of California, 52 Cal. Rptr.2d 466, 472 (Cal.Ct.App. 1996)).

This additional element in the tenure review process has been referred to as "collegiality" [see R. Mawdsley, "Collegiality as a Factor in Tenure Decisions," 13 *Journal of Personnel Evaluation in Education* 167 (1999)] or "personality" [see P. Zirkel, "Personality as a Criterion for Faculty tenure: The Enemy It Is Us," 33 *Cleveland State Law Review* 223 (1984)]. For the sake of brevity, the term "collegiality" will be used in this material.

Use of "collegiality" presents three legal problems:

(1). Neither of the terms may be part of the university's documents regarding requirements for tenure;

(2). Reviewing collegiality or personality looks at a qualification of the candidate that is (arguably) qualitatively different from scholarship, teaching, and service, viz., the candidate's relationships with other faculty/personnel and students.

(3). Concerns regarding a candidate's collegiality may not have been brought to the candidate's attention prior to the final tenure review and/or the allegation of collegiality may contrary to favorable reviews during the tenure process of scholarship, teaching, and service.

II. Legal Issues Regarding Collegiality

A. What does "collegiality" mean?

Use of collegiality can be the basis for reviewing faculty even if not part of university documents.

See Bresnick v. Manhattanville College, 864 F.Supp. 327 (S.D.N.Y. 1994) - collegiality could be considered as a factor in a candidate's "service" as long as not prohibited by the employment contract

Generally, case law reflects that the meaning of "collegiality" is determined descriptively, i.e., by using language that allegedly summarizes the nature of the relationship between a nontenured faculty member and other faculty/personnel or students.

For an exception to this statement, see an academic department's collegiality policy that became the basis for denying tenure:

> (1) interpersonal honesty and integrity, (2) the effective management of conflict and disagreement that are an inevitable part of organizational life, (3) trust in the continuing appropriate behavior after tenure is granted, and (4) behavior that helps other colleagues successfully contribute to the mission.
>
> Babbar v. Ebadi, 216 F.3d 1086 (10 Cir. 2000)

Samples of language used to describe conduct alleged to not be collegial include:

"non-cooperation with colleagues" (Jawa v. Fayetteville State Univ., 426 F.2d 218 (E.D.N.C. 1976)) .

"bickering" (Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).)

"lack of a sense of camaraderie" (Hetrick v. Martin, 480 F.2d 705 (5th Cir. 1980)).

"clashes of personality" (Johnson v. University of Pittsburgh, 435 F.Supp. 1328 (W.D.Pa. 1977)).

"constant sniping," "inability to maintain harmony" (Kelly v. Kansas City, 648 P.2d 225 (Kan. 1982)).

"troublemaker" (Pace College v. Commission on Human Rights, 339 N.E.2d 880 (N.Y. 1975)).

"hostile and uncooperative attitude" (Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982)).

B. **Collegiality as relationship with other university personnel**

Charges of lack of collegiality arise with relationship to other university personnel, as well as students

Case law indicates that universities are not required to reward with tenure persons who are contentious and divisive.

Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981)

- denial of tenure upheld for faculty member who refused to teach according to department's requirements and sought to remove the department chair

Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973)

- nonrenewal of nontenured faculty member for failure to adjust to other faculty

Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972)

- nonrenewal of faculty for engaging in a pattern of "running disputes" with department chairs

C. **Collegiality as relationship with students**

Kumar v. Board of Trustees, University of Massachusetts, 774 F.2d 1 (1st Cir. 1985)

- denial of tenure for faculty member with poor evaluations

Zahorik v. Cornell Univ., 779 F.2d 85 (2d Cir. 1984)

- denial of tenure to female faculty member whom graduate students did not want to work with and who was "too feminine"

Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986)

- termination of nontenured faculty member for in-class profanity

III. Faculty Responses to Charges of Lack of Collegiality

A. Discrimination

Babbar v. Ebadi, 216 F.3d 1086 (10th Cir. 2000

- faculty member denied tenure pursuant to department policy defining collegiality

Citron v. Jackson State Univ., 456 F.Supp. 3 (S.D.Miss. 1977)

- faculty member denied tenure alleged race, national origin, religion discrimination under Title VII

Howze v. Virginia Polytechnic and State Univ., 901 F.Supp. 1091 (W.D.Va. 1995)

- female faculty member denied tenure granted trial on issue of gender discrimination

Stein v. Kent State Univ., 181 F.3d 103 (6th Cir. 1999)

- tenure track female faculty member's contract nonrenewed for lack of collegiality

B. Free Speech

Omlor v. Cleveland State Univ., 543 N.E.2d 1238 (Ohio 1989)

- denial of tenure for an ethnic slur

Williams v. Alabama State Univ., 979 F.Supp. 1406 (N.D.Ala. 1997)

- denial of tenure for criticism of required textbook

Thornton v. Kaplan, 937 F.Supp. 1441 (D.Colo. 1996)

- denial of tenure resulting from heated exchange in a faculty meeting

IV. Conclusion

Courts tend to support negative tenure decisions based on collegiality, even though no express statement regarding the role of collegiality in the tenure process exists and there is lacking a preexisting definition of collegiality.

Courts tend to defer to the judgment of tenure reviewers and generally are satisfied with anecdotal statements regarding lack of collegiality, without requiring those involved in the tenure process to produce evidence that an unsuccessful candidate has bee disruptive within the meaning of free speech, insubordinate or incompetent within the meaning of "for cause" terminations.

A Legal Overview of the Use of Statistics in Discrimination Cases

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THE COURTS AND THE USE OF STATISTICAL PROOFS IN EMPLOYMENT DISCRIMINATION CASES IN EDUCATION

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There are lies, damned lies, and statistics. William Gladstone.

Proving discrimination in employment cases in education can be a daunting task in many instances. Employers are not likely to leave "smoking guns" in employment files or tenure and promotion folders. How then can an aggrieved applicant for employment or tenure or promotion, who feels that they have been passed over for these benefits not because of lack of credentials or ability, but rather because of some overtly or covertly discriminatory practice, prove that discriminatory practice to a court in the absence of tangible probative evidence? One way is through the use of inferential statistics.

The United States Supreme Court established the precedent for the use of statistical proofs as probative evidence in Bazemore v. Friday[1]. In this case black employees of the North Carolina Agricultural Service alleged that there was discrimination in pay based on the race of the employees. In their suit against the state, the plaintiffs relied on a multiple regression analysis in which the salaries of the employees were regressed on the independent variables of race, education, tenure (years of service), and job title. These variables had been selected based on the deposition testimony of an Extension Service official who testified that the criteria for salary were education, tenure, job title, and job performance.

The Supreme Court reversed the Court of Appeal's decision rejecting the multiple regression model selected by the plaintiffs on the basis that there were omitted variables. In its opinion the Supreme Court created an answer to the question of omitted variables when "the major factors" are included. The Court stated:

> The Court of Appeals erred in stating that the petitioners' regression analyses were "unacceptable as evidence of discrimination" because they did not include "all measurable variables thought to have an effect on salary level." The court's view of the evidentiary value of the regression analysis was plainly incorrect. While the omission of

variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis that accounts for the major factors "must be considered unacceptable as evidence of discrimination."[1] Normally, failure to include variables will effect the analysis' probativeness, not its admissability.

How has this principle been applied by the courts in subsequent cases? Two cases are particularly illustrative. In Sobel v. Yeshiva University[2] plaintiffs alleged discrimination against women at the Albert Einstein College of Medicine of Yeshiva University. They accused Yeshiva of gender discrimination against women in salary and promotion. The difference in mean salaries for men and women, without adjustments for productivity, was $3500.00. It was alleged that the men had greater experience, education, longer tenure at the institution, and higher academic ranks.

The plaintiffs presented a multiple regression model in which salary was the independent variable and the explanatory variables were education, work experience, and tenure at the institution. Prior to trial, the defendants' experts objected to the model and added the following additional variables: license to practice in New York, rate of publications, and detailed departmental classifications. The coefficients for sex were negative in every year and this coefficient indicated that women faculty on average earned $3200.00 less than equally qualified men.

The defendants argued that the model remained flawed because it failed to include variables such as rank, time in rank, administrative responsibility, and assignment to research or clinical positions (clinical assignments are more highly paid than research assignments). The defendants argued that rank was a particularly important component of the model because it accounts for aspects of productivity not accounted for in any of the other variables. Plaintiffs argued that rank as a variable was tainted because of the university's discriminatory promotion practices. Even with these variables included, the sex coefficient (-2,204) indicated that women on average earned $2, 204.00 less than equally qualified men. The district court found for the defendant holding that the difference was a result of underadjustment bias.

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[1] Bazemore v. Friday, 478 U.S. 385 (1986).
[2] Sobel v. Yeshiva University, 839 F.2d 18 (2d Circuit, 1988).

The evidence was clear that certain types of productivity, such as ... grants, clinical expertise, ... and a significant clinical work load, had a direct effect upon compensation and should have been accounted for as significant sources of productivity differences. In addition, it was important to take account of the less tangible but highly important faculty of the quality of performance in the areas of research, teaching and clinical practice. Although these factors are not easily quantifiable, we cannot conclude that their omission had no effect on the results of the multiple linear regression model. On the contrary, the fact that male faculty members scored higher on sixteen of the plaintiffs' twenty proxies strongly suggests that the omission of the less tangible factors distorted the results in favor of the plaintiffs. The court agrees, therefore, with the defendant's conclusion that the failure to adequately account for productivity resulted in the underadjustment bias and plaintiffs' overstatement of the sex-coefficients. 566 F. Supp. 1166 at 1180.

On appeal the court of appeals reversed on issues not related to the regression issue and remanded to the district court instructing that faculty rank should be included as a variable but that the underadjustment argument was rejected. They held that it was impossible to determine which group was more adversely affected by the lack of perfection of the variables reflecting productivity.

Put another way, all that is known about the proxies used by the plaintiffs in their regression is that they are not perfect measures of productivity, and that insofar as they do measure productivity they show that men on the AECOM faculty possess the attributes tied to productivity in greater measure. What is not known is whether variables that exactly measure productivity would show the same advantage for men, a lesser advantage for men, or a larger advantage. In short, the simple fact of imperfection, without more, does not establish that plaintiffs' model suffers from underadjustment, even though men score higher on the proxies. 839 F.2d at 34.

A more recent case is Smith v. Virginia Commonwealth University[3]. In this case male professors at Virginia Commonwealth University brought n action under Title VII of the Civil Rights Act of 1964 objecting to salary raises given to female faculty members as a result of a salary equity study conducted by the university. The district court found a statistically demonstrated disparity between male and female salaries and granted VCU summary judgment. On appeal, the Court of Appeals reversed.

In this case VCU conducted an internal salary study to determine if there was gender bias in the salaries paid to male faculty as opposed to female faculty. The study was a multiple regression analysis which controlled for the variables of doctoral degree, academic rank, tenure status, number of years at VCU, and number of prior academic experience. The study presumed that any difference in salary after controlling for the aforementioned variables would be attributed to sex. A regression study done in 1989 showed a $1354.00 difference in salaries not attributable to permissible factors. A second VCU allocated more than $440,000.00 to increase the salaries of female faculty members outside the normal merit increase process. All women who requested salary review analysis done in 1991 showed a difference of $1982.00. After the study was completed received a salary increase. Plaintiffs filed suit and the district court granted summary judgment.

The Court of Appeals found fault with VCU's failure to include performance variables in their regression model. VCU argued that that performance variables would be too difficult to quantify and that indirect performance variables were already included in the study in the form of academic rank, status, and experience. The Court also found the model flawed in that it did not take into account a faculty member's prior status as an administrator. At VCU administrators were paid higher wages than faculty and when a former administrator returned to a faculty position they retained that increased salary. Of the 82 faculty members who had previously been administrators, 71 were male. Finally, the Court took issue with the Study Commission's presumption that there was no reason to suspect that female faculty members were less productive than male faculty members.

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[3] Smith v. Virginia Commonwealth University, 84 F.3d 672 (4th Circuit, 1996).

In its decision the Court addressed the issue of discrimination under Title VII if an affirmative action plan is designed to provide pay raises only to female faculty members. In applying the Weber Test to the plan (does it break down old patterns of discrimination; it does not unnecessarily trammel the rights of those outside the group it is designed to protect; and it is designed to eliminate a manifest racial or sexual imbalance) the Court questioned whether there was a manifest imbalance in compensation between male and female faculty members. Citing Bazemore, the Court questioned the sole use of the multiple regression analysis to determine manifest imbalance and to grant the pay raises based solely on that one criteria. The Court when on the state that the validity of VCU's affirmative action policy depends on the accuracy and validity of the multiple regression analysis. In Bazemore the Supreme Court held that the regression analysis was to be considered in light of all other evidence in the record. The Fourth Circuit Court held that VCU could on Bazemore to establish as a matter of law that the regression analysis was sufficient to determine manifest imbalance.

In questioning the validity of the study, the Court found problems with the lack of performance factors. Stating that "Bazemore and common sense require that any multiple regression analysis used to determine pay disparity must include all the major factors on which pay is determined." The Court also noted that the very factors VCU used in determining annual merit pay raises (performance, productivity, and merit) were left out of the study. VCU alleged that it used "crude proxies" (such as grant of tenure or promotions) for these factors because, due to their subjective nature, performance factors are not suitable for statistical analysis. Also omitted from the study was the amount of time actually spent teaching as opposed to the lapse of time since the professor began teaching.

In conclusion, because the Court found that far too many important variables had been omitted from the multiple regression analysis, and the appellants had demonstrated that the omitted variables were crucial to a valid analysis of pay disparity, the decision of the district court was reversed.

These cases point out that statistical proofs are a permitted manner or proving employment discrimination in education settings, but the studies must be carefully crafted. Omission of relevant variables or the use of inappropriate statistical methodology can invalidate the use of the study in court. Careful attention to the choice of the design and an appreciation of what data is valid to either proof or reproof of the claim is essential.

A Legal Overview of the Use of Statistics in Discrimination Cases

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The Fourteenth Amendment's equal protection clause states that no state shall deprive any person of the equal protection of the laws. The equal protection clause prohibits the government from invidiously discriminating among classes of individuals within its jurisdiction. In order for a plaintiff to make out a successful racial discrimination action under the equal protection clause he or she must establish that the public school intentionally or purposefully discriminated on the basis of race.[1]

In order to prevail in a discrimination suit brought under the equal protection clause, a plaintiff must prove that school officials intentionally discriminated against him or her. As a consequence of the difficulty of proving discriminatory intent, plaintiffs have increasingly turned to federal anti-discrimination statutes, which have wider application for relief. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination in both public and private (with 15 or more employees) institutions on the basis of race, color, religion, sex and national origin.[2] Title VII allows an employer to defend an allegation of gender discrimination in hiring if sex is a bona fide occupational qualification (BFOQ). The BFOQ defense is not permitted as a defense in race discrimination cases under Title VII. Title VII covers discrimination in hiring, firing, promoting and sexual harassment.[3] The Equal Employment Opportunity Commission (EEOC) is charged with responsibility of enforcing Title VII.[4]

As a general rule, a plaintiff bringing an employment discrimination suit must initially demonstrate a *prima facie* case of discrimination. In establishing a *prima facie* case, a plaintiff must show that he or she was burdened or belongs to a specific category burdened by an employer practice affecting a group protected by one of the federal anti-discrimination laws.[5] The inference from a *prima facie* showing may be rebutted by the employer by producing evidence of a nondiscriminatory business justification for the employee's treatment.[6] In Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989), the United States Supreme Court held "that the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."[7]

The nature of Title VII protection varies with the nature of the alleged discrimination. Two approaches are used by plaintiffs to prove discrimination in employment decisions. Plaintiffs allege disparate treatment, which focuses on discriminatory intent, and disparate impact, which seeks to prove that a facially neutral employment practice has a statistically significant adverse effect on members of a protected class. Competing concepts of equality underlie these two analytical frameworks.[8] Disparate treatment seeks equality of opportunity and treatment. It emphasizes that race or other impermissible criteria should not be considered in employment decisions. Disparate impact, on the other hand, seeks to attain equality of outcome or achievement. The goal in disparate impact cases is not simply to compensate individual victims of specific acts of intentional discrimination, but rather to remedy the class wide effects of racial injustice.[9] In International Brotherhood of Teamsters v. U.S., [10] the court maintained that Title VII plaintiffs may base their claim on either or both approaches and courts may apply one of the other in deciding a case.

A unanimous Supreme Court in Griggs v. Duke Power Co. developed the disparate impact discrimination theory of Title VII[11] in 1971. Griggs extended Title VII to practices that are "fair in form, but discriminatory in operation."[12] The premise underlying disparate impact theory is that if an ostensibly neutral employment practice has an exclusionary effect that operates as the functional equivalent of intentional discrimination, then that practice must be scrutinized to determine whether it serves an essential purpose of the employers operation. If the practice cannot be shown to be a business necessity, the practice violates Title VII. In Griggs, Chief Justice Warren Burger speaking for the court declared: "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built in headwinds for minority groups and are unrelated to measuring job capability."[13] Thus, under disparate impact theory, an employer's liability can be proven without evidence of the employer's subjective intent to discriminate.

A claim of discrimination under Title VII may be based on statistical data even to the extent that statistical proof alone may make out a prima facie case of discrimination against an employer.[14] The Supreme Court recognized the probative value of statistical analysis of an employer's work force in Title VII suits as early as 1977 in the Teamsters case.

Congress amended Title VII in 1991 by specifically codifying a disparate impact claim under Title VII.[15] The amended law provided that once a plaintiff has presented sufficient evidence to make a prima facie case, both the burden of production and the burden of persuasion shifts to the employer to show that the challenged practice is both job related and a business necessity. The plaintiff must identify and prove the specific practice challenged and demonstrate that it has created the disparate impact under attack. Finally, the plaintiff must prove that the employer could have used other practices that would have no disparate impact while still serving the employer's legitimate business interests.[16]

A significant complication arises in determining and constructing the proper statistical comparison in Title VII cases. In Hazelwood School District v. United States,[17] the Supreme Court addressed the question of comparison in cases involving statistical evidence of discrimination and held that in cases involving statistical evidence of discrimination and held that in cases involving skilled job categories, the proper comparison should be between the employer's work force and only that pool of the local labor market qualified for the job, not as Teamsters had suggested, the local general population. The court indicated in Hazelwood that general population statistics had been appropriate in Teamsters "because the job skill that involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs [the statistics] may have little probative value."[18] Thus, in Hazelwood to infer whether or not the defendant, a suburban St. Louis School District, had discriminated in the hiring of teachers, the court held that the "proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."[19]

How does the court determine the qualified population and the relevant job market? The problem of identifying a pool of persons possessing special qualifications, skills, which sometime even an employer may have difficulty quantifying or describing, are formidable. Even where courts and parties can agree on the appropriate labor pool, disagreements will inevitably arise over the proper geographic measure of the labor pool.

In a case widely criticized by civil rights activists, Wards Cove v. Antonio, the Supreme Court visited the Title VII initial inquiry of what constitutes the proper "qualified population-relevant labor market comparison."[20] The litigation in Wards Cove involved a Title VII challenge to the hiring and promotion practices in the Alaskan salmon industry. The defendant company operated canneries in which jobs were divided into skilled and unskilled, the skilled jobs paying more and providing much better working conditions than the unskilled jobs. The skilled jobs (non-cannery jobs) were filled almost entirely by whites and the unskilled jobs (cannery jobs) were filled by minorities. The company also divided the living and dining areas between the skilled and unskilled employees. The plaintiffs alleged that the hiring and promotion practices of the company were responsible for the work force's racial stratification and denied them (unskilled workers) employment as skilled (non-cannery) workers on the basis of race. The plaintiffs based their claims on both disparate treatment and disparate impact theories.

The plaintiffs (unskilled workers) lost on both theories of action in the district court. The Court of Appeals for the Ninth Circuit reversed the lower court, finding that the plaintiffs had established a prima facie case of disparate impact, on the basis of comparing the internal workforce (skilled and unskilled) statistics showing a wide disparity between the high percentage of whites in skilled jobs and the high percentage of minorities in the unskilled jobs.

The Supreme Court reversed the Ninth Circuit's opinion in a 5-4 vote. Justice White delivered the opinion of the divided court, finding that the Court of Appeals erred in ruling that a comparison of the unskilled cannery workers who were nonwhite and the percentage of skilled noncannery workers who were also nonwhite made out a prima facie disparate impact case. Rather, according to the majority in Wards Cove the proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market, citing Hazelwood.[21] The court held, with respect to noncannery skilled jobs at issue, that the cannery unskilled work force in no way reflected the pool of qualified job applicants or the qualified labor force population. As long as the employers selection methods or employment practices cannot be said to have a disparate impact on nonwhites and if the absence of minorities holding such skilled jobs reflects a dearth of qualified nonwhites applicants for reasons that are not plaintiffs fault the court found that Title VII would not be violated. With respect to the unskilled cannery jobs, the court concluded, as long as there are no barriers or practices deterring qualified nonwhites from applying, the employer's selection mechanism probably does not have a disparate impact on minorities if the percentage of selected nonwhite applicants is not significantly less than the percentage of qualified nonwhite applicants. Where this is the case, the majority maintained, the percentage of nonwhite workers found in other positions in the employer labor force is irrelevant to a prima facie statistical disparate impact case.

With respect to relying on statistics alone to establish a *prima facie* case of disparate impact, the Supreme Court said in Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S.Ct.2777 (1988):

> The plaintiff's burden in establishing a *prima facie* case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff…is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.[22]

In addition, Watson was a very significant employment discrimination case because the court held that disparate impact analysis is applicable to subjective hiring and promotion practices such as personal interviews. Thus, if a plaintiff can demonstrate that a facially neutral employment practice, such as a personal interview or other subjective employment practice, has a significant adverse effect on a protected group, then discriminatory intent or purpose is not required to make out a Title VII case. The court stated:

> An employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct... It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent... If an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply... We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.[23]

Today, the most contentious aspect if a Title VII disparate impact case centers on how a court determines the qualified population and the relevant job market. Which statistical population is used for comparison can determine whether or not the plaintiff shows a significant disparity. The focus is on defining the qualified applicant pool. In order to determine whether an employment practice causes a disparate impact, a court must determine the baseline racial or gender composition that the impact is disparate from; that is, what should the racial or gender composition of the job force look like absent the offending practice.[24]

The statistics relied upon by courts in disparate impact cases must have probative value. "To adequately assess statistical data, there must be evidence identifying the basic qualifications [for the job or job benefit at issue] and a determination, based upon there qualifications, of the relevant statistical pool with which to make the appropriate comparisons," Peightal v. Metropolitan Dade Co. (1994).[25] It is clear that most of the current disparate impact cases boil down to a "contest between the plaintiff and defendant... in which both seek to answer the question of who is qualified and thus to define the qualified applicant pool on their own terms."[26] And this of course, becomes a battle of the experts and the briefs.

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[1] Washington v. Davis, 426 U.S. 229 (1976); Brunet v. Tucker, 510 U.S. 1164 (1994).

[2] 42 U.S.C. ♣2000 et. seq.

[3] Id.

[4] Id.

[5] McDonnell Douglas Corp. v. Green, 411 U.S. 729, 93S.Ct. 1817 (1973).

[6] Wards Cove Packing Co. v. Antonio 109 S.Ct. 2115 (1989).

[7] Id., p. 2126 of S.Ct.

[8] David Baldus and James Cole, Statistical Proof of Discrimination, (Colorado Springs, Colorado: Shepards Inc., 1980), pp. 26-51.

[9] Id.

[10] International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).

[11] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[12] Id., p.431.

[13] Id., p.432.

[14] Wards Cove Packing Co. v. Antonio, supra note 6.

[15] Public Law No. 102-166, 105 Stat.1071, codified at 42 U.S.C. 2000, et.req.

[16] 42 U.S.C. 2000e-2(K)(1)(A)(I) (2000).

[17] Hazelwood School District v. United States, 433 U.S. 299 (1977).

[18] Id., p.308.

[19] Id.

[20] Wards Cove Packing Co., supra note 6.

[21] Id.

[22] Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S.Ct.2777 (1988).

[23] Id. at 2786-2787.

[24] In re: Employment Discrimination Litigation Against the State of Alabama, et al., v. State of Alabama, 198 F.3d 1305 (11th Cir. 1999).

[25] Peightal v. Metropolitan Dade County, 26 F. 3d 1545, 1553-54 (11th Cir. 1994).

[26] In re: Employment Discrimination, supra.note 24, at 1312.

The Electronic Media and School Violence

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I. INTRODUCTION

It is widely held that a central goal of public education is to prepare young people for participation in and contribution to a liberal democratic society. Today, that democratic society is dominated by invention and application of technology. Communication avenues, opportunities, and audiences have expanded. Participation and prosperity in a technological world depends on the ability and facility to join and compete. As a result, the goals and missions of education must be transformed so that the eager participants -- the students -- may be prepared to contribute and succeed in this increasingly technological world. Schools are developing curricula, teaching courses, and training their students to use electronic media, not only for the simplified completion of school assignments, but also for educational and employment opportunity after graduation.

II. RECENT EVENTS ON SCHOOL GROUNDS: LESSONS LEARNED AND ISSUES PRESENTED

The Violent Episodes: Predatory and Psychopathological

(1) In Pearl, Mississippi, three students were killed and seven wounded in October 1997. The student who confessed to the shootings often played violent fantasy video games that he found on the Web.

(2) In Springfield, Oregon, where four students were killed in May 1998, the student killer allegedly was so enmeshed in violent Internet sites that his parents deprived him of television and took away his computer.

(3) In Paducah, Kentucky, in December 1997, parents of the three girls who were killed filed a lawsuit against 25 media companies, charging that the high school freshman gunman played violent computer games and frequently visited Internet pornography sites. James v. Meow Media, Inc., 90 F. Supp.2d 798 (W.D. Ky. 2000).

(4) A Web site created by the two Littleton, Colorado, high school students responsible for the

shootings at Columbine High School contained extensive information on how to make bombs.

The non-violent episodes - situational and relationship

Dustin Mitchell -- a Rolla High School honor student in Missouri -- was suspended for a remark he made in a teens-only chat room five days after the Littleton, Colorado, shooting. He responded "Yes" to the question of whether such a tragedy could happen at his school. Mitchell used the name of another student known for wearing a black trench coat. Mitchell was suspended for 10 days. The ACLU said his punishment violated his First Amendment rights and damaged his academic standing, thus making him ineligible to participate in the National Honor Society and forcing him to miss statewide achievement tests. These tests were used to determine placement in college courses. ACLU Defends Missouri Honors Student Suspended for Remark in Internet Chat Room (Oct. 14, 1999). <http://www.aclu.org/news/1999/n101499b.html>

Sean O'Brien -- a 17-year-old horn player in the Cleveland, Ohio, suburb of Westlake -- built a Web site criticizing his band teacher. O'Brien, the son of an oncologist, called his band teacher "an overweight middle-aged man who doesn't like to get haircuts." O'Brien was suspended for ten days under a code of conduct provision that required students not to "demonstrate physical, written, or verbal disrespect/threat" against school employees. The student closed down his Web site after the suspension, but sued and was reinstated after serving eight days of the suspension. His complaint against the school district featured a violation of his First Amendment rights of free expression; the suit was settled out of court for $30,000. Ohio Teen Wins Court Order Protecting Web Site (March 19, 1998) <http://www.freedomforum.org/speech/1998/3/19studentweb.asp>; and Ohio Teen, School Officials Settle Web Site Lawsuit (Dec. 11, 1998) <http://www.freedomforum.org/speech/1998/12/11mastudent.asp>

Brandon Beussink -- a 17-year-old high school student -- was suspended for ten days for posting a homepage on the Internet. The homepage was critical of his high school and school personnel. The criticism included crude and vulgar language. Student visitors to the page were urged to email the principal and inform him of their respective negative concerns. Suspension Over Web Page Violates Free Speech Rights, Judge Rules (Dec. 29, 1998) <http://www.freedomforum.org/speech/1998/12/29cape.asp>

Aaron Smith -- a 13-year-old Texas middle school student -- created a CHOW (Chihuahua Haters of the World) Web page where stories could be shared about those who hated that breed of dog. The page was visited by a professional dog breeder who subsequently contacted the school and threatened an animal-rights protest. Aaron volunteered to remove the reference to the school, but that was not enough to prevent his suspension and removal from his computer class. School Challenges Students' Internet Talk (March 8, 1998) <http://www.nytimes.com/library/national/030898speech.htm>

Paul Kim -- a high school senior with a 3.8 grade-point-average -- included on his Unofficial Newport High School Home Page links to sexually explicit material and poked fun at his classmates for being obsessed with sex. School officials revoked Kim's recommendation for a National Merit Scholarship and admission to college. Kim took his case to court and won a monetary settlement of $2000. The settlement also included a provision for the student to reapply for the scholarship. Internet Sex Note Hurts College Hunt <http://www.cc.columbia.edu/~pkk11/piarticle.html>

Burklin Nielson -- a 16-year-old -- was admonished for exploring contemporary witchcraft religion in an after-hours school lab in the small town of Winter, Wisconsin. The case revolved around whether a student should have freedom to explore a controversial topic on school computers after hours. Minneapolis Star Tribune, March 31, 1999.

A 17-year-old Campolindo High School student was suspended for five days after school officials discovered his Web page Camposux.iwarp.com. The Web site labeled some students as homosexuals and featured an administrator's head superimposed on a naked body. The ACLU defended the student and argued that student rights included the right to vent frustrations about their high school. Elizabeth Bell, Student Protest over Web Site Discipline: Moraga School Cites Safety Issues, San Francisco Chronicle, Sept. 17, 1999.

Thomas Obrermeyer -- a high school student in Alaska with 4.98 grade-point-average, and with a chance to be valedictorian in his class -- was given an F for accessing a pornographic Web site on a school computer. The student claimed some element of prejudice (as his mother was an outspoken former school board member), since other students guilty of the same infraction were not punished as severely. School officials also meted out the sanction claiming that the student abused a position of trust and permitted other students to access the site while he had keys to otherwise locked computer classrooms. The student's lawyer claimed that the punishment is much too serious for the offense and that an academic sanction is inappropriate for a disciplinary infraction. Sheila Toomey, Porn Web Site Snares East's No. 1 Student, Anchorage Daily News, (January 21, 2000) <http://www/adn.com/stories/T00012139.html>

Adam Muse -- a Falmouth, Massachusetts, high school student -- was suspended for comparing his band teacher to Adolf Hitler in an email message. The district superintendent asserted, "Schools can penalize students for off-campus behavior that is a danger to the school". The superintendent could say only that the opinion was pretty outrageous, but reserved comment on whether it was a danger to the school district. Muse was suspended for two days. An ACLU representative opined that a ten-day suspension and permanent exclusion from participation in band was "outrageous". Moreover, such a reaction "cannot nullify First Amendment rights" and "[t]he school is sending a message that [it doesn't] believe in an open exchange of ideas and speech." Student Says School Suspended Free Speech When it Disciplined Him (Dec. 11, 1998) <http://www.freedomforum.org/speech/1998/12/11mastudent.asp>

The ACLU Response

The fact that school officials are educating students for citizenship is reason "for unscrupulous protection of their constitutional freedoms ... if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Nadine Strossen, Students' Rights and How They are Wronged, 32 U. Rich. L. Rev. 457 (1998).

III. THE FIRST AMENDMENT IN CYBERSPACE: THE RIGHT TO FREE SPEECH IN THE GLOBAL MARKETPLACE OF IDEAS

A. The Marketplace of Ideas and the Expression of Unpopular Views

More than half a century ago, Justice Douglas, in the United States Supreme Court's majority opinion in Terminiello v. City of Chicago, helped to define the boundaries of the global marketplace of ideas:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

This sentiment has been expressed for decades in several other Court opinions. These cases, few of which apply directly to conduct over the Internet, nonetheless offer some guidance to the developing law of free speech in cyberspace.

Cohen v. California, 403 U.S. 15 (1971). Cohen was convicted under a California criminal statute that prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person ... by ... offensive conduct". Cohen wore, in a Los Angeles courthouse, a jacket that contained a vulgar four-letter allusion to the Selective Service System. The Supreme Court reversed the conviction. The government may not regulate this sort of speech on the theory that it was inherently likely to cause violent reaction, or on the assertion that the states, as guardians of public morality, could properly remove the offensive word from the public vocabulary. According to the Court, "while the particular four-letter word being litigated here is perhaps more distasteful than others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."

Texas v. Johnson, 491 U.S. 397 (1989).Johnson burned an American flag as part of a protest at the Republican National Convention in 1984, and was convicted under a Texas statute for desecration of a venerated object. The Supreme Court overturned the conviction. Expressions may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace. The government cannot assume that every expression of a provocative idea will incite a riot. It must look to the actual circumstances surrounding the expression.

School settings are not immune to judicial rulings favoring the expression of unpopular viewpoints over the restriction of them. In fact, it was the 1967 decision in Keyishian v. Board of Regents that helped to usher these widely-cited statements into common usage:

> The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discover truth out of a multitude of tongues, rather than through any kind of authoritative selection. 385 U.S. 589, 603 (emphasis added).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Supreme Court struck down the suspension of students who wore black armbands to school, in silent protest of the United States involvement in Vietnam. The Court held that any restriction of the content of a student's speech must be motivated by "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Id. at 509. In order for the school to restrict the speech of students, the speech must lead to actual or reasonable forecast of substantial disruption of or material interference with the day-to-day operation of schools or the rights of others.

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982). Despite the curricular authority possessed by the State, public school board members may not remove books from a school library simply because they disagree with the ideas contained in them. Curricular decisions must be made without inhibiting students' rights to receive information. However, school boards may remove books from library shelves if the books' educational suitability is in question. Virgil v. School Bd. of Columbia County, 862 F.2d 1517 (11th Cir. 1989). This is especially true if the books are deemed to be sexually explicit or excessively vulgar. School officials may take into account the emotional maturity of student audiences when curricular decisions are made either in the classroom or in the school library.

B. Unprotected Speech

1. Clear and Present Danger

Schenck v. United States, 249 U.S. 47 (1919). Conviction under the Espionage Act of 1917, which prohibited people from willfully causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The Court affirmed the convictions and held that words which ordinarily and in many places would be within the freedom of speech protected by the First Amendment may become subject to prohibition when those words are of such a nature or are used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent.

2. Fighting Words

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). A New Hampshire statute forbade any person from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place," or "call him by any offensive or derisive name." The Supreme Court upheld the statute and the conviction, and construed the statute as limited to the use in a public place of fighting words "likely to provoke the average person to retaliation [and to acts of violence], and thereby cause a breach of the peace." Id. at 574.

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). The Supreme Court struck down a city ordinance that made it a misdemeanor to place on public or private property "a symbol, object, appellation, characterization or graffiti ... which one knows or has a reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Id. at 379. The Court recognized the several classes of unprotected speech, including fighting words, but warned against government restriction of speech based on the content of that speech. The government may not regulate those words "on hostility -- or favoritism -- toward the underlying message expressed". Id. at 386. The ordinance in R.A.V. did just that. While the ordinance lawfully criminalized the use of fighting words, it only criminalized fighting words that insult, or provoke violence on the basis of race, color, creed, religion, or gender.

United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997). Abraham Jacob Alkhabaz, a.k.a. Jake Baker, was arrested and charged with a violation of a federal statute prohibiting people from transmitting "in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another". 18 U.S.C. sec. 875(c). The Sixth Circuit Court of Appeals held that the stories did not constitute threats, as required by the criminal statute at issue. To constitute a threat under the law,

> a communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm ... and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation. Id. at 1495.

3. Obscenity

Miller v. California, 413 U.S. 15 (1973). Speech is obscene if the average person, taking the speech as a whole and applying contemporary community standards, would find that speech to (1) appeal to a prurient interest in sex; (2) depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) lack serious literary, artistic, political, or scientific value. Id. at 24. In Miller, the defendant conducted a mail advertisement campaign to sell illustrated adult books. The advertisements were sent, unsolicited, to a California restaurant, and the restaurant employees complained to the police. These facts, crossed with the technology available today, create an interesting scenario. Without effectively written and enforced laws to address Internet conduct, similar unsolicited material mat be distributed and sold to any willing and unwilling Internet surfers, whether or not they intended to receive the mail.

Ginsberg v. New York, 390 U.S. 629 (1968). The Court upheld a state statute prohibiting the sale of sexually explicit magazines to school-age children. The materials were not deemed obscene for adults and, in fact, were freely sold to that population. The Court held that such materials could not be sold to children under 17 years of age, as states may legislate a standard of obscenity that is different for children. Even when the speech is not legally "obscene" under

Miller, pornography that involves children is also unprotected by the First Amendment. Osborne v. Ohio, 495 U.S. 13 (1990).

California v. Hsu, 2000 WL 1060642 (Cal. Ct. App. 2000). Court upheld a statute that criminalizes the dissemination of harmful matter electronically or by the Internet with the intent of arousing sexual desires, and with the intent or for the purpose of seducing a minor. First, the court found that the statute did not violate the commerce clause. According to the court, the statute even-handedly regulated conduct to effectuate a legitimate local public interest. Second, the court upheld the law against a free speech challenge, and held that the statute was a permissible content-based restriction on speech under the First Amendment.

4. Imminent Lawless Action

Brandenburg v. Ohio, 395 U.S. 444 (1969). A Ku Klux Klan leader was convicted under an Ohio criminal law for advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing political reform. The Supreme Court reversed the conviction. According to the Court, "[t]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id. at 447. There are three cebtral elements to the Brandenburg test:

(1) First, the speaker must promote more than lawless action. The action must be imminent.
(2) Second, the action must be likely to occur.
(3) Third, the speaker must intend this action to occur.

IV. THE FIRST AMENDMENT IN CYBERSPACE: RECENT LEGISLATIVE ATTEMPTS TO REGULATE VIOLENT SPEECH IN THE MARKETPLACE

A. Legislation Specifically Targeted to Internet Expression

1. The Communications Decency Act and Reno v. ACLU

Through its key provisions, the purpose of the CDA was to protect minors from obscene, indecent or patently offensive Internet material and to impose criminal penalties on knowing creators and transmitters of such material. CDA, sec. 501-561, 110 Stat. 133-143. The United States Supreme Court declared that the CDA violated the First Amendment, in that it was vague and overbroad. 521 U.S., at 870-874, 877-879.

2. The Children's On-Line Protection Act and ACLU v. Reno (Reno 2000)

The Third Circuit Court of Appeals recognized the government's compelling interest in protecting children from harmful materia but court struck down the Children's On-Line Protection Act (COPA), and held that the provision was unconstitutionally overbroad and, therefore, not narrowly tailored to meet the compelling interest. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000). The court ruled that the law violated free speech rights because material on the Web is accessible to all users and there is currently no way to screen minors while simultaneously protecting the rights of adults.

B. Restrictions on the Constitutional Rights of Students in Cyberspace

With significant statements from two landmark Supreme Court cases, the constitutional fate of school regulations of student conduct over the Internet is predictable: these regulations often stand, rather undaunted.

(1) Courts have "repeatedly emphasized the need for affirming the comprehensive authority of the States and of the school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. at 507.

(2) "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring).

1. Recent Applications to Computer-Related Infractions

Board of Education of Monticello Central School District v. Herzog, 690 N.E.2d 480 (N.Y. 1997). A student produced an underground newspaper on his home computer and distributed copies on school grounds. The student was suspended for writing an article in the paper entitled "Jack of Hearts". The article encouraged students to urinate on school floors, throw garbage in the school and write graffiti on the walls. The trial court overturned the punishment, indicating that the student was not afforded due process because the charges for which he was disciplined failed to specify the infraction for which he was accused. Quoting Goss v. Lopez, the court announced that students facing suspension must at a minimum, "be given some kind of notice and afforded some kind of hearing." Id. at 483.

Kish v. Annville-Cleona School District, 645 A.2d 361 (Pa. Commw. Ct. 1994). Parents of a high school student appealed the school district's decision to expel their son for allegedly stealing computer equipment from school. The student was said to have copied keys to both the exterior and interior parts of the school building, a violation of school district policy. The problem with the school's response to the infraction was not substantive; it was procedural. The parents claimed that they and their son were prevented from attending a portion of the hearing and that the student's counsel did not attend the hearing because of a schedule conflict. Moreover, there was direct evidence presented at the hearing of the student's involvement in the theft. The court ruled that the hearing was compromised as the parents presented sufficient facts to support their position.

Pittsburgh Board of Public Education v. MJN, 524 A.2d 1385 (Pa. Commw. Ct. 1987). A high school freshman was expelled for gaining unauthorized access after hours into his school's main computer. He accessed the system from his home. He was charged with violating the school code, which prohibited substantial damage to school property and for non-compliance with directions when under the authority of school personnel. The state court declared the school decision a denial of fundamental fairness as the school board, at the expulsion hearing, permitted its legal counsel to commingle prosecutorial and advisory (quasi-judicial) functions. The court held that such conduct prejudiced the student.

2. First Amendment Free Speech Challenges

a. Traditional First Amendment Law in School Settings

Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969). Students wearing black armbands to protest the Vietnam War engaged in constitutionally protected symbolic speech. Schools may regulate non-sponsored, non-vulgar student speech if school officials can reasonably forecast substantial disruption or material interference with the "requirements of appropriate discipline in the operation of the school." Id. at 513. The Supreme Court has recognized the right of schools to take disciplinary action against students to maintain daily operation of the school. Schools may not base a disciplinary decision on what amounts to merely the fear of discussion that comes from an unpopular viewpoint.

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). The Court upheld the suspension of a student who, at a school assembly, delivered a vulgar speech filled with sexual innuendo. The Court stated that the First Amendment does not prevent school officials from determining that to permit a student's vulgar and lewd speech would undermine the school's basic educational mission. It is perfectly appropriate for the school to disassociate itself to make the point to pupils that vulgar speech and lewd conduct are inconsistent with the "fundamental values" of public school education. Id. at 685. To make these points, the Court recognized the continued vitality of the in loco parentis doctrine and the school's interest in protecting children from sexually explicit, indecent, or lewd speech.

Hazelwood Indep. Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). Several high school students complained that their school's principal violated students' rights when he cut two pages from a school newspaper. The principal argued that the newspaper was created as part of the curriculum and that two of the articles in the paper were inappropriate for the audience. The Supreme Court agreed with the principal, and recognized the school's broad powers in censuring student speech in a non-public forum and declared that the school's newspaper fell within that context. Schools are not obligated to support or promote student speech that is inconsistent with school purposes. Speech that appears to carry the school's imprimatur may be prohibited if a legitimate pedagogical concern exists to regulate such speech. Id. at 272-273.

b. Application to Internet Violence

Beussink v. Woodland R-IV School District, 30 F. Supp.2d 1175 (E.D. Mo. 1998). Beussink, the student-plaintiff, had posted a homepage on the Internet that was critical of

Woodland High School, its teachers, and its administrators. The criticism included crude and vulgar language, and invited readers to contact the school principal to communicate their opinions regarding the school. The homepage was created at home on a home computer, not during school hours and not using school facilities or software. Beussink had created a hyperlink from his homepage to the school's homepage. There was not a corresponding link from the school to Beussink, however.

On a First Amendment challenge, the court applied Tinker. The decision was sympathetic to the necessity of instilling and maintaining discipline and respect for school personnel in the school, but the court found that the Web site did not disrupt school activities or the rights of others. The court continued and held that

> [i]ndeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protection of the First Amendment. The First Amendment was designed for this very purpose. Speech within the school that substantially interferes with school discipline is entitled to protection. The public interest is not served by allowing Beussink's message to be free from censure, but also by giving students at [this high school] this opportunity to see the protections of the United States Constitution and the Bill of Rights at work. Id. at 1182.

Boucher v. School Bd. of Sch. Dist. of Greenfield. 134 F.3d 821 (7th Cir. 1998).

Justin Boucher was expelled from school for one year after writing an article, "So You Want To Be A Hacker", for his high school's underground newspaper. The article, with a byline to Sacco and Vanzetti, gave readers instructions on how to hack the school's computers, and consistently referred to teachers in vulgar and indecent terms. The article advised, "the school isn't all that smart so the password should be easy to guess or crack".

Boucher, claiming a First Amendment violation, argued that he was merely speaking in the subject of computer use and hacking. The court of appeals held that an injunction against the proposed expulsions would cause the board irreparable harm. The board was correct in characterizing the injunction as undermining the authority of the board to take disciplinary action for what the board believed to be a serious threat to its property. Boards of education have the authority to undertake school discipline, in good faith, to protect the school's vital interests. Under a Tinker analysis, the court held that the school need not wait until an actual disruption of school operations occurred before imposing discipline. Here, there was a reasonable forecast of material and substantial disruption. "The article is neither an essay on computers in the abstract nor a mere hostile critique of Greenfield High School. Instead, it purports to be a blueprint for the invasion of Greenfield's computer system along with an encouragement to do just that." Id. at 828. Third, the court rejected Boucher's argument that the school lacked the authority to discipline off-campus activity. The court found that the paper was distributed widely at school and advocated improper on-campus activity.

J.S. v. Bethlehem Area School District, 2000 Pa. Commw. LEXIS 402 (No. 2259 C.D.

1999, July 14, 2000). A middle school student appealed his school district's decision to permanently expel him. The student had created, at home, an Internet Web site containing threatening and derogatory comments and pictures about his principal and one of his teachers. The Web site was titled "Teacher Sux", and caused physical emotional injury in its targeted subjects, as well as low morale and high disruption of many school activities throughout the school. The Pennsylvania court held that the expulsion did not violate the First Amendment free speech guarantee. The school district successfully cited evidence that supported its decision to expel. This case is important because it distinguished between a student's out of school Web site that is merely unpleasant and upsetting and one that warrants disciplinary action because it is violent and threatening.

c. School Uniforms: Lessons Learned and Application to Internet Speech of Students

An initial question to be asked is whether the wearing of a particular type or style of clothing is granted constitutional protection. A two-part test, articulated in Texas v. Johnson, 491 U.S. 397, 404 (1989):

(1) The student must intend to convey a particular message.
(2) There must be a great likelihood that the message would be understood by those who hear or view it.

Bivens v. Albuquerque Public Schools, 899 F. Supp. 556 (D.N.M. 1995). A student brought an action under Section 1983 based on a claim that a school dress code prohibiting the wearing of saggy pants violated his First Amendment rights. The student contended that wearing sagging pants was a part of a style known as "hip hop", the roots of which were African-American and that the style was, in large part, a matter of group identity. The court held that there was no First Amendment violation as engaging in the practice of "sagging" was not speech or expressive conduct protected by the First Amendment.

Pyle v. School Committee of South Hadley, 667 N.E.2d 869 (Mass. 1996). The Massachusetts supreme court decided, under a Tinker analysis, that public high school students have freedom to engage in speech that might be considered vulgar but does not cause disruption or disorder in school. Two students claimed that a school dress code policy prohibiting "clothing that was obscene, profane, lewd, or vulgar" violated their First Amendment rights to free expression. In making its decision, the court found that a state statute governing this issue required that, to prohibit student expression, school officials must show it is disruptive:

> The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish, and disseminate their views, and (c) to assemble peaceably on school property for the purpose of expressing their opinions. Id. at 871.

Phoenix Elementary Sch. Dist. No. 1 v. Green, No. 2 CA-CV 96-0279, 1997 WL 149726 (Ariz. Ct. App. March 27, 1997). The court affirmed an injunction in favor of the school and its required school uniform policy. First, the court determined that the school was not a public forum and held that the school could impose reasonable time, place, and manner restrictions upon speech in light of the purpose of the forum. Second, the court held that the speech restriction was not content-based, but rather a neutral policy that furthered reasonable goals of the school. Those goals included school safety, school pride and unity, elimination of label competition, and lower costs for parents. In other words, the school policy aimed to regulate the medium and not the message.

d. Underground Newspapers and Other Non-Sponsored Publications

How might this law apply to on-line conduct? Many underground newspapers -- and school-sponsored publications, for that matter -- are published on the Web.

e. Time, Place, and Manner Restrictions

Without the school sponsorship and without a strong argument for school imprimatur, underground publications likely enjoy greater constitutional freedom. Nevertheless, reasonable time, place, and manner restrictions may be imposed on the distribution of both sponsored and non-sponsored literature. See, e.g., Hemry v. School Bd., 760 F.Supp. 856 (D. Colo. 1991).

f. Prior Restraints

Another option for school leadership is the use of a prior restraint, where a school official reviews the non-sponsored publication for content before it is distributed. While prior restraints are rarely upheld under First Amendment scrutiny, those rare exceptions often exist in school settings. D. Sperry, P.T.K. Daniel, D. Huefner, & E.G. Gee, Education Law and the Public Schools: A Compendium (1998), at 983-984.

Bystrom v. Fridley High School Independent School District. 822 F.2d 747 (8th Cir. 1987). The school district claimed the right to prior review of an underground newspaper, and students filed suit. The court agreed with the school. Accordingly, the school reserves the right to restrict distribution of material that is obscene to minors, libelous, pervasively indecent or vulgar, invasive to the privacy of another person, or presents a clear and present likelihood of causing a material or substantial disruption of the proper and orderly operation and discipline of the school or school activities. The court held that the prior review was not impermissibly vague or overbroad and held that Tinker does not extend free expression to the invasion of the rights of others.

But see Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988). The school's prior review policy was overbroad and content-based, and promulgated and enforced in violation of the First Amendment.

The contribution of Bethel School District v. Fraser, 478 U.S. 674 (1986), to the prior restraint discussion. Schools possess the right to disassociate themselves from speech and other conduct that they deem to be inconsistent with the school's missions, values, and curriculum. One avenue to assure that disassociation is a prior review of the material that enters and pervades the school.

V. EXISTING LEGISLATION GOVERNING SCHOOL RULES AND REGULATIONS: APPLICATION TO INTERNET VIOLENCE

A. Response to Recent School Shootings: New Laws and Amendments to Existing Laws

1. Obligation and Authority to Make Rules

State legislatures typically require each school board to adopt student discipline codes. For example, the Ohio Revised Code requires each school board to adopt a policy regarding suspension, expulsion, removal, and permanent exclusion that specifies the type of misconduct for which students may be suspended, expelled, removed, or permanently excluded. Ohio Rev. Code Ann. sec. 3313.661(A). See also, e.g., Mo. Rev. Stat. sec. 171.011 (1991); Okla Stat. tit. 70 sec. 6-114 (1985); Vt. Stat. Ann. tit. 16 sec. 1161a (1989).

Along with these general requirements, many states have recently required the adoption of zero tolerance policies for violent, disruptive, or inappropriate behavior, including excessive truancy. See, e.g., Ohio Rev. Code Ann sec. 3313.534.

2. Required School Safety Plans

a. North Carolina

Requires each board of education to develop a "local school administrative unit safe plan designed to provide that every school in the local school administrative unit is safe, secure, and orderly, that there is a climate of respect in every school, and that appropriate personal conduct is a priority for all students and all public school personnel." See N.C. Gen. Stat. sec. 115C-105.47.

b. Ohio

Ohio's Senate Bill One, enacted in 1999, defines, under criminal law, a "school safety zone" to consist of a school, school building, school premises, school activity, and school bus. Senate Bill One increases the penalties for certain crimes committed in school safety zones: disorderly conduct, weapon possession, weapon use, homicide, and assault against a school employee. Ohio Rev. Code Ann. sec. 2901.01(C).

Senate Bill One requires schools to adopt school safety plans to (1) examine the environmental conditions and operations to determined potential hazards to students and staff; (2) propose operating changes to promote the prevention of potentially dangerous problems and circumstances; (3) involve local law enforcement, safety officials, students, parents, teachers, and staff; and (4) consider incorporating remediation strategies into the plan for any building where there are documented safety problems. The plans must include a protocol for addressing serious threats to the safety of school personnel, students, or school property; and a protocol for responding to emergencies that compromise the safety of school personnel, students, or school property. Ohio Rev. Code Ann. sec. 3313.536.

3. Expanded Disciplinary Authority

Senate Bill One expands the authority and the jurisdiction for suspensions and expulsions. For example offenses subjecting students to one-year expulsions now include conduct that results in serious physical harm to persons, if the conduct occurs while the offending student is at school, on any other board-controlled property, or at an interscholastic competition, extracurricular activity, or any other school-sponsored program or activity. Before Senate Bill One, firearm and knife possession carried one-year expulsions. Ohio Rev. Code Ann. sec. 3313.66(B).

B. Preexisting Laws: Applicability to Online Conduct Both On and Off School Grounds

Are schools their policies are equipped to deal with new forms of speech and new avenues of violence? Schools' discipline codes may not need too much revision in order to combat student violence over the Internet, regardless of whether the violent conduct originates on or off campus.

1. Conduct Related to a School Activity

Provisions in existing student codes of conduct that apply to any violent acts by students will cover violence over the Internet, as well. If the infraction occurs during a school-sponsored activity on or off campus, normal school rules and regulations apply.

Under **Ohio**'s Senate Bill One, if the infraction begins on campus or at a school activity and then moves off campus (where the more serious infractions may occur), the school may enforce reasonable rules and regulations. Ohio Rev. Code Ann sec. 3313.66(A).

Under **Georgia** law, each of the following infractions, committed "during school hours and at school-related functions", applies to student violence over the Internet:

(1) Verbal assault of teachers, administrators, and other school personnel
(2) Disrespectful conduct toward teachers, administrators, and other school personnel
(3) Verbal assault of other students
(4) Disrespectful conduct toward other students
(5) Verbal assault of and disrespectful conduct toward persons attending school-related functions. Ga. Code Ann. sec. 32-856.5(a)(1).

But in **Massachusetts**, see Mass. Ann. Laws ch. 71 sec. 84:

No student shall be suspended, expelled, or otherwise disciplined on account of marriage,

> pregnancy, parenthood, or for other conduct which is not connected with any school-sponsored activities ...

This law is applicable to cyberspace violence of students, but only such conduct that can be connected to a school-sponsored activity. Clearly, this will be effective for violence originating at school. But what about the home-created Web sites and associated violent expression?

2. Requirement that the Violent Actor be Physically Present on School Grounds for the Violence to Occur and for the Rules to Apply?

Under **Colorado** law, Colo. Rev. Stat. sec. 18-9-109:

> (1) No person shall, on or near the premises or facilities of any educational institution, willfully deny to students, school officials, employees, and invitees: (a) lawful use of the property or facilities of the institution; or (b) the right of lawful ingress and egress of the institution's facilities
>
> (2) No person shall, on the premises of any educational institution or at or in any building or other facility being used by any educational institution, willfully impede the staff or faculty of such institution in the lawful performance of their duties or willfully impede a student of the institution in the lawful pursuit of his educational activities through the use of restraint, abduction, coercion, or intimidation or when force and violence are present or threatened.

On their face, the words of this provision do not seem to apply directly to the at-home student creation of violent Internet Web sites. However, consider again the story in J.S. v. Bethlehem Area School District, 2000 Pa. Commw. LEXIS 402 (No. 2259 C.D. 1999, July 14, 2000). The Web site at issue in J.S. contained violent images and derogatory remarks about the staff at the expelled student's school. One of the targets of the violent Web site, a teacher at the school, suffered lasting effects from viewing the page, including stress, anxiety, loss of appetite, loss of sleep, loss of weight, and short-term memory loss. An argument can be made that a statute like Colorado's would apply here. The lawful use of the facilities and lawful performance of school duties were impeded by the conduct of J.S., despite the fact that the student's Web site and associated conduct were committed off campus.

Can the same argument be made for laws that require "apparent present ability" or fear or expectation of "immediate serious physical injury"?

Ga. Code Ann. sec. 32-856.4(a). This provision requires each board of education to adopt a policy that prohibits bullying of a student by another student. "Bullying" means "any willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so; or any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm." Id. (emphasis added).

3. Emergency Removal of Student from Classroom or School

In **Texas**, a teacher may remove a student from class if

> (1) the student repeatedly interferes with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn, or
>
> (2) the student's behavior is so unruly, disruptive, or abusive that is seriously interferes with the teacher's ability of the student's classmates to learn. Tex. Educ. Code Ann. sec. 37.002.

How would a court interpret such a provision in light of Internet violence? Was the legislative intent that the law would apply only to physical acts that occur on school grounds? Is it legally possible to "remove" a student from class when that student is not physically present? In today's fast-paced cyberspace world, one can argue that a student who sends threatening and violent messages and images over the Internet is, in essence, present enough to removed, especially if he or she is present enough to cause the disruption to the learning process.

4. School Authority to Discipline Off-Campus Conduct

According to one New York court, if an infraction occurs off campus (e.g., between two student, or between a student and a family member of a classmate), the school may enforce reasonable rules and regulations if it can show that there is a nexus between the off-campus conduct and the daily operation of the school -- that is, the health, safety, and welfare of the students or staff. Pollnow v. Glennon, 594 F. Supp. 220 (S.D.N.Y. 1984), aff'd, 757 F.2d 496 (2d Cir. 1985). See also Richard J. Dickinson, Off Campus Conduct: Can You Discipline?, 40 Ohio Sch. Boards Ass'n J. 2 (Sept. 1996).

Consider Internet harassment from one student's home computer to a classmate's home computer. Each of the following examples would give the school discretion to respond to such a scenario.

Colorado: a student may be suspended or expelled for behavior "on or off school property which is detrimental to the welfare or safety of other pupils or of school personnel including behavior which creates a threat of physical harm to the child or to other children". Colo. Rev. Stat. sec. 22-33-106(3).

Mississippi: "It shall be unlawful for any person to intimidate, threaten or coerce, or attempt to intimidate, threaten or coerce, whether by illegal force, threats of force or by the distribution of intimidating, threatening or coercive material, any person enrolled in any school for the purpose of interfering with the right of that person to attend school classes or of causing him not to attend such classes." Miss. Code Ann. sec. 37-11-20.

Nevada: "It is unlawful for any person to disturb the peace of any public school by using vile or indecent language within the building or grounds of the school. ? It is unlawful for any person maliciously and purposely in any manner to interfere with or disturb any persons peaceably assembled within a building of a public school for school district purposes." Nev. Rev. Stat. Ann. sec. 392.480.

New Jersey: A student may be suspended for "conduct of such a character as to constitute a continuing danger to the physical well-being other pupils". N.J. Rev. Stat. sec. 18A: 37-2(4) (a).

Oregon: A student may be suspended or expelled for "use of threats, intimidation, harassment or coercion against any fellow student or school employee, open defiance of a teacher's authority or use or display of profane or obscene language". Or. Rev. Stat. sec. 339.250.

Texas: School disruptive activities include "preventing or attempting to prevent by force or violence ... a lawful assembly authorized by the school administration so that a person attempting to participate in the assembly is unable to participate due to a reasonable fear that force or violence is likely to occur". Tex. Educ. Code Ann. sec. 37.123(2).

There are some provisions that allow for the application of student codes, regardless of not only whether the conduct occurs on or off campus, but also whether or not the conduct can be connected to the school. In **Ohio**, under Senate Bill One, regardless of where the misconduct occurs, schools may enforce reasonable rules and regulations against the student perpetrators if the conduct is directed at a district official or employee or the property of such official or employee. Ohio Rev. Code Ann. sec. 3313.661(A). This provision seems easily applicable to Internet harassment from a student's homepage to the Web site or e-mail (either at work at the employee's home) of a teacher or administrator.

C. Liability Statutes

Finally, there are some states that have enacted provisions holding parents liable for the violent acts of their children. For example, consider the following from Mississippi: Miss. Code Ann. sec. 37-11-53(2)(a).

> A parent, guardian or custodian of a compulsory-school age child enrolled in a public school district shall be responsible financially for his or her minor child's destructive acts against school property or persons.

VI. SCHOOL DISTRICT LIABILITY FOR INTERNET VIOLENCE

A. Gender Discrimination

Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999). Student sent suggestive and hostile email messages to faculty members, resulting in two professors instituting sexual harassment charges pursuant to the university's judicial code. The student was found guilty of the charges and was ultimately expelled. She filed an action alleging discrimination and retaliation on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. sec. 1681, et seq. She claimed that her email were retaliation against the university for a lack of action against her own complaints against sexual harassment by a male professor.

The university, invoking Eleventh Amendment immunity, moved to dismiss the complaint. The student responded, maintaining that Congress, through the enactment of the Civil Rights Remedies Equalization Act, 42 U.S.C. sec. 2000d-7(a)(1), abrogated the university's Eleventh Amendment immunity or, alternatively, the university waived its immunity as a condition of receiving federal funds. The court agreed with the student that the school, in fact, had waived its immunity by accepting federal funds under Title IX. Moreover, following the decision in Geyser v. Ago Vista Independent School District, 524 U.S. 274 (1998), the court ruled that the student was imbued with an implied right of action against sexual harassment by a teacher in such a program, provided the program's officials have "actual notice" and have been "deliberately indifferent to the teacher's misconduct".

B. Disability Discrimination

Martin v. Temple, 1998 WL 57303 (6th Cir. Tenn.). Student was expelled for a year for invading the computer programs of other students and interfering with their ability to complete courseware. The student brought an action under the Americans with Disabilities Act (ADA), 42 U.S.C. sec. 12132, et seq. She claimed that she had a disability, that other students who committed the same acts were treated differently, and that school officials intentionally discriminated against her because of membership in a protected class. The school claimed Eleventh Amendment immunity. The court established that such immunity is not available against ADA claims. However, the court also found no merit in the student's claim. The court found that she had interfered with the rights of other students, and there was nothing in the record to show that the university had expelled her because of any disability. The court declared that the student was not "otherwise qualified" to remain a student in light of her misconduct.

C. Discrimination of Gender and Disability

Lipson v. Trustees of the University of Pennsylvania, 1996 WL 479532 (E.D. Pa.). A university student was expelled for tampering with another student's computer files. He was expelled after appearing before a university disciplinary committee. Thereafter, the student brought an action against the university under Title IX and ADA, claiming that university officials ignored his complaint about repeated unwanted sexual conduct on the part of the other student and discrimination in the basis of disability. As to gender, the court held that an allegation of student-to-student sexual harassment must demonstrate that the school had actual knowledge, failed to take appropriate action, had control over the environment where the harassment took place, and had control over the perpetrator's behavior. None of these were substantiated in evidence.

The student also alleged that he was discriminated on the basis of disability when the university developed a false belief that the university community was endangered by his actions which were characterized as "bizarre" and "disturbing". His claim was that a major life activity, learning, was substantially limited because the university falsely regarded him as having a mental impairment. Again, the court found no credible evidence for this claim.

VII. CONCLUSION

It is difficult for the educators to control dangerous and violent Internet conduct and to strike a proper balance between the traditional values of education in a democracy and the exponential growth and speed of largely unregulated communication in cyberspace. Do educators have the tools necessary to strike this balance?

Three themes and pieces of advice:

(1) Caution: in light of new, largely unregulated technologies, we argue for school leaders to give due consideration to existing law and refrain from unwise rushes to legislate and restrict.

(2) Clarity: in recognition of the fact that some regulation is necessary, we encourage process, thought, and analysis sufficient to avoid unconstitutional vagueness or overbreadth.

(3) Consistency in regulation -- consistency with the central goals of public education, and with the Madisonian model of free speech, which advocates political and economic equality, shared civic culture, reflective, and deliberative debate, and a diversity of represented viewpoints.

Freedom of Expression outside the Classroom: The First Amendment, Student Organizations and the Public Forum Doctrine

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Freedom of Expression Outside the Classroom: The First Amendment, Student Organizations and the Public Forum Doctrine

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First Amendment rights to free speech and assembly govern the relationship between public higher education institutions and students. The evolution of these rights in the college and university setting has been characterized by judicial inquiry into the content, form and context of student speech.

There is little question that an institution's authority to suppress free speech can be exercised when student conduct substantially disrupts the educational environment, involves a material interference in the institution's operations or invasion of the rights of others.[1] Federal courts addressing the free speech rights of students in public higher education settings consistently place the burden of proof on the institution to present evidence that student protests substantially disrupt or materially interfere with the institution's mission.[2] As a consequence, institutional discretion to suppress student speech through the enforcement of disciplinary penalties has received exacting judicial scrutiny. For example, in Papish v. Board of Curators of the University of Missouri,[3] a graduate student's expulsion was reversed on the basis that the distribution of a newspaper containing indecent speech and cartoons on a public university campus might not be suppressed in the name of "conventions of decency." In one of the first student free speech cases to make its way to the Supreme Court, the majority, despite a dissent from then Justice William Rehnquist, emphasized that the student was dismissed because the content of the publication, which could not be characterized as "constitutionally obscene or otherwise unprotected,"[4] was disapproved by university administrators.

The United State Supreme Court, in Healy v. James[5] placed particular emphasis on the nature of the college campus as a "marketplace of ideas"[6]and recognized that once a public higher education institution creates a forum for the expression of student viewpoint, it must permit expressive activities within the context of the forum it has created. In Healy, the Court stipulated that First Amendment protections "should apply with no less force on college campuses than in the community at large" and added "(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[7] The opinion placed emphasis on the nature of the forum created for student expression and held that a public higher education institution could not deny recognition to a student organization solely on the basis of disagreement with that organization's political views or on evidence of disruption a similar organization might have fomented at another campus.

Forum Analysis

Forum analysis is an analytical construct intended to balance the individual's right to speak in public places and the state's interest in preserving some areas for specific or unique governmental purposes.[8] If the state may restrict the scope of property considered to be a public forum, then it may limit expressive activity. When property is so restricted, a standard of reasonableness applies to regulation of speech in that area.[9]

The United States Supreme Court identified the consequences of designations that include "public forum," "limited public forum," and "non-public forum" in the case of Perry Education Association v. Perry Local Educators' Association.[10] The Court majority upheld a school board's policy limiting access to teachers' mailboxes and the school district's mail system as reasonable. The school district's policy of allowing access to the teacher's union that had been elected the exclusive bargaining unit, but denying access to a rival organization, was based on the status of the respective unions rather than the substantive views they might espouse. The majority concluded that the mail system was a nonpublic forum, and held that selective access to a nonpublic forum need only meet a standard of reasonableness, provided the restriction was not an effort to suppress views with which public officials disagreed.[11]

In Perry, the Court reaffirmed that a traditional public forum, such as public streets and parks, would include property used for expressive activity by virtue of long tradition or governmental fiat. The Court distinguished designated public fora as those that the state has opened for use by the public as a place for expressive activity.[12] The state may impose reasonable regulations relating to time, place and manner of speech in traditional public fora and designated public fora provided these regulations are narrowly tailored in order to serve a substantial governmental interest and leave open alternative channels for expression.[13]

The state may also create a limited public forum, restricting access to certain groups or to discussion of certain subjects. In Cornelius v. NAACP Legal Defense and Education Fund,[14] Justice O'Connor, for a plurality of four justices, set forth the principle that the existence of a "limited public forum" is to be ascertained entirely by reference to the government's intent to open a forum to expressive activity.[15] The Court held that the federal government could exclude legal defense and political advocacy organizations from participation in a charity drive directed at federal employees, provided that the content-based regulation served a compelling governmental interest and was narrowly tailored to achieve its objective.[16]

The public forum doctrine was applied to a case involving the First Amendment expressive activities of student groups in Widmar v. Vincent.[17] In Widmar, the United States Supreme Court held that once a public university makes its meeting facilities generally available for use by student groups, it cannot deny to student religious groups the right to meet based on the content of the group's proposed speech. The Court acknowledged that, as to students, the public university campus might be analogized to a public forum, but noted that:

> [A] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.[18]

Notwithstanding the limited public forum recognized and adopted by the Supreme Court in Widmar, application of forum analysis to public institutions of higher education remains problematic. The judicial characterization of a public higher education institution as "a marketplace of ideas" does not necessarily conform to the concept of a limited forum,[19] nor have federal courts offered clear criteria to be used in determining the nature of the forum for First Amendment purposes. As one commentator has pointed out, "while forum analysis began as an objective inquiry, over time it has developed into a largely subjective analysis resulting in the dissipation of First Amendment rights in public places."[20]

Following the reasoning in Widmar, public colleges and universities may distinguish between students and non-students when the exercise of speech on the campus is involved. Implied in this analysis is the notion that public institutions of higher education are not traditional public fora and are best characterized as limited open fora. Consequently, the institution may designate some areas of the campus as closed, even to students, but has an obligation to promulgate reasonable time, place and manner restrictions to insure students access to a limited open forum for expressive activity.[21]

Public institutions of higher education may vigorously assert a nonpublic forum when clear educational purposes are projected. Speech disseminated under the sponsorship or auspices of the institution has significant weight in a finding of nonpublic status. When the institution sponsors programs, emphasizes specific educational goals, and individuals and groups are invited to attend, then a nonpublic forum has generally been recognized.[22] However, even if a nonpublic forum is recognized, federal courts have been alert to the possibility that institutional administrators sought to suppress speech.

In DiBona v. Matthews,[23] the administrative cancellation of a drama class that included the presentation of a controversial play was found to violate free speech. The instructor was authorized to select curricular materials, and administrators became interested in the subject matter of the course only after opposition from religious representatives in the community was brought to their attention. While decisions on curriculum carry the characteristics of a nonpublic forum, the court's ruling was predicated on the view that the cancellation of the class was an attempt to suppress speech with which the administrative officials disagreed. Similarly, in Brown v. Board of Regents of the University of Nebraska[24] the university's cancellation of a scheduled showing of a film entitled "Hail Mary" was regarded as a violation of the constitutional rights of persons wishing to view it. The cancellation occurred after members of the public and a state legislator complained that the film blasphemed certain religious groups. When considering the constitutional interest implicated by an administrative decision interfering with the right to receive ideas, the court ruled that cancellation could not be justified merely to avoid a controversy that might result from the expression of ideas.[25] In Aldrich v. Knab[26] a federal district court ruled that a public radio station operated by the university was a nonpublic forum, yet vindicated the right of workers at the station to undertake on-air criticism of the station's policies and operations despite a policy prohibiting such criticism. The court found that the "no criticism" policy was an unconstitutional, content-based suppression of viewpoints protected by the First Amendment.[27]

Restrictions on Speech

Any content-based restriction on speech in a public forum remains subject to exacting judicial scrutiny. While a reasonable forecast of classroom disruption, interference with university sponsored activities or actual physical damage to university property might justify the suppression of free speech on a public campus, public institutions have tolerated a high degree of free speech protection consistent with their mission, and crafting any content-based restriction on free speech is difficult.

The Court in Healy described as "a heavy burden" the higher education institution's responsibility to demonstrate the appropriateness of a restraint on speech.[28] For example, institutional requirements for prior approval of student press activities have been constitutionally suspect[29] as have content-based requirements for approval of student demonstrations[30] and invited speakers.[31] These prior approval requirements may be interpreted as a prior restraint on free expression, which has been assailed as "the most serious and the least tolerable infringement of First Amendment rights."[32]

In some instances, the evidence necessary to prohibit protest may be predicated on a reasonable forecast rather than on the actual consequences of student protest. If institutional administrators can establish that substantial disruption is imminent, either because the speaker is inciting imminent lawless action or because the protestors themselves are poised to engage in such disruption, then restraining speech may be justified.[33] However, institutional administrators must avoid predicating the suppression of free speech on the likelihood that onlookers will initiate the disruption.[34]

Some content-based restrictions on speech may be permissible if they relate to speech that does not receive constitutional protection. Fighting words,[35] speech that incites "imminent lawless action"[36] and legally obscene speech[37] are not protected by the First Amendment.

Courts have also distinguished between distribution of materials and solicitation on the college campus. In Glover v. Cole[38] the federal appeals court held that the university could ban commercial or political solicitation by nonstudent groups in order to protect students from harassment and fraud. Furthermore, commercial hawking of publications may be prohibited when it poses dangers of disruption, congestion, harassment and duress.[39] However, federal courts may be more tolerant of policies that place reasonable restrictions on distribution in order to protect the campus atmosphere from commercial hawking. For example, in Texas Review Society v. Cunningham[40] the federal district court upheld the constitutionality of a university regulation requiring free publications containing paid advertisements to be distributed from unmanned stands.

Content related restrictions on speech are particularly vulnerable to challenges based on vagueness and overbreadth. Vagueness challenges are predicated on the assertion that disciplinary sanctions for conduct must be sufficiently clear to inform reasonable persons of the prohibited conduct. Overbreadth challenges are directed to conduct codes that are not narrowly tailored and might extend to constitutionally protected speech. This dual challenge to disciplinary restrictions on student speech is well illustrated in the hate speech cases, in which institutions sought to promulgate disciplinary rules prohibiting racial, ethnic, sexual or other forms of harassment that might include racial slurs, verbal epithets, demeaning comments, or the creation of a hostile educational environment. In these cases, courts consistently ruled that institutional policies were constitutionally overbroad, sweeping protected speech within the scope of the disciplinary rule.[41] Although vagueness and overbreadth challenges have led to the elimination of "hate speech" codes at many public institutions, enhanced punishment for bias related conduct is constitutionally permissible. In Wisconsin v. Mitchell,[42] the United States Supreme Court upheld a state statute that enhanced the punishment for commission of a crime when the victim was intentionally selected because of his "race, religion, color, disability, sexual orientation, national origin or ancestry." The unanimous ruling married the crime (aggravated battery), which was conduct punishable by law, to a racial statement by the defendant that demonstrated his motive. The Court divorced the defendant's "bias-inspired conduct," which justified an enhanced penalty, from his abstract beliefs, which were constitutionally protected. Similarly, institutions of higher education may devise enhanced penalties under student conduct codes for racially motivated conduct that results in harm or injury to others.[43]

Commercial speech and commercial solicitation may be restricted, but the public institution of higher education must demonstrate that the interest in restricting the commercial solicitation is substantial.[44] In Board of Trustees of State University of New York v. Fox,[45] the United States Supreme Court held that a public university's interest justified a prohibition on the door-to-door solicitation of houseware sales in residence halls. The Court found that the university had a legitimate and substantial interest in the control of its own property and the maintenance of a peaceful and studious environment for student residents.[46] However, it is unlikely that an institution's restrictions on door-to-door commercial solicitation in residence halls would be applicable to other areas of the campus where the university's interest as property owner would be outweighed by the recognition of a forum.

Institutions may undertake reasonable regulation of student speech and assembly, provided that these regulations emphasize time, place and manner regulation and avoid content-based restrictions on speech. However, these regulations must be narrowly tailored to serve a substantial governmental interest and leave open ample alternative channels for communication. In Ward v. Rock Against Racism[47] the United States Supreme Court emphasized that reasonable restrictions on free speech may extend to regulating noise levels of protests. The Court noted that reasonable restrictions must be content-neutral and narrowly tailored to realize legitimate governmental interests, but that these restrictions need not be the least restrictive means of regulating speech. Thus, narrow tailoring need do no more than promote a substantial governmental interest in order to be valid. Such a standard would grant institutions greater flexibility in framing content-neutral restrictions on the manner of student speech.

Restrictions on the time, place and manner of speech in a public forum require that regulations be reasonable, narrowly tailored to realize significant institutional objectives, and allow for alternative communication channels. Reasonable regulations must be content-neutral in that they are not based upon the content or subject matter of the speech.[48] In a public forum, reasonable and "narrowly tailored" content-neutral restrictions are legitimate, but restrictions need not be the "least restrictive."[49] A narrowly tailored restriction is one that does not "burden substantially more speech than is necessary to further the government's legitimate interests."[50]

Federal courts have carefully evaluated regulations on the distribution of literature. In Hays County Guardian v. Supple,[51] Southwest Texas State University regulations that prohibited solicitation on the campus were held to impermissibly restrain free expression when applied to prohibit the handing out of newspapers containing advertisements. The regulation, which restricted the individual's ability to hand out political commentary to the passing public on the campus, could not be justified on the basis of speculative notions of inconvenience to students or litter reduction.[52] The court recognized that restricting commercial solicitation to prevent disruption of traffic and harassment by hawkers may be a legitimate interest of the university, but the application of the anti-solicitation regulation to distribution of a newspaper was incompatible with that legitimate interest.[53]

This time, place and manner test is similarly applicable to instances of symbolic speech on the university campus, particularly when regulations are related to ensuring public safety, protecting public resources, or maintaining campus safety and security. In University of Utah Students Against Apartheid v. Peterson,[54] a section of the commons area on the public university campus was recognized as a limited public forum that the institution had opened for use as a place for expressive activity. The federal district court noted the institution's past practice of allowing various rallies and demonstrations in the area and emphasized that the institution's "Student Bill of Rights," guaranteed speech and assembly without prior restraint or censorship. When the public university sought to remove shanties erected to protest policies of the government of South Africa, the court noted that no formal regulations had been developed which could be used to define reasonable time, place and manner restrictions applicable to the forum, and modified the university's removal order, limiting it to requiring student protesters to make anti-apartheid shanties portable so they could be removed each night due to increased violence and protection costs.

However, in Students Against Apartheid Coalition v. O'Neil[55] the federal appeals court upheld revised regulations providing for the removal of student-erected shanties from the lawn of the University of Virginia's rotunda after the institution refined a lawn-use policy that emphasized esthetic interests. The court found the new restrictions to be sufficiently content neutral and narrowly tailored, and emphasized that it left open ample alternative channels of communication to justify the shanty's removal. The decision in O'Neal relied in part on the United States Supreme Court decision in Clark v. Community for Creative Non-Violence[56] in which the Court upheld regulations imposing restrictions on protests in National Parks, emphasizing that the regulations did not restrict the content of speech, were narrowly tailored to serve a significant governmental interest, and provided for alternative channels of communication.

Recognition and Funding of Student Groups

The most recent developments in the evolution of student free speech and assembly rights have to do with the recognition and funding of student groups in public higher education. As Healy makes clear, students in public higher education institutions have free speech and associational rights to organize and to use campus meeting rooms, bulletin boards, and other facilities on an equal basis with other student organizations and subject to reasonable time, place and manner restrictions imposed by the institution. The threshold question of whether a student group has a right of access to the limited open forum created by a public university has been addressed and the right affirmed. This right to access was litigated in a number of cases involving gay and lesbian student organizations, all of which prevailed on claims that denial of recognition violated free association and speech rights under the First Amendment.[57]

In Widmar, the Court rejected a public university's contention that the Establishment Clause would preclude a registered student religious group from using campus facilities for worship and religious discussion. The Court held that the university, by opening its facilities to student groups, could not exclude a student religious group because of objections to the content of its speech.[58]

When considering the authority of institutions to place limitations on the recognition of student groups, courts have traditionally invoked "limited" public forum analysis. For example, in Gay Student Services v. Texas A. & M. University,[59] the federal court recognized a distinction between a "designated public forum" open to the general public and a "limited public forum by designation" that is open to certain groups or for the discussion of certain subjects.

In Rosenberger v. Rector and Visitors of the University of Virginia,[60] the United States Supreme Court recognized that the public university had created a limited open forum when it established its system for student organizations. Having arranged to pay third party outside contractors for the costs of a variety of publications prepared by recognized "contracted independent organizations," the university was prohibited from relying on funding guidelines that restricted financial support for programs or activities that promoted, among other things, "a particular belief in or about a deity or an ultimate reality." The Court majority ruled that once the university created a limited public forum, it could not engage in viewpoint discrimination based on the views of the student groups it had elected to subsidize. To maintain a position of neutrality with regard to religion, the institution could take steps to dissociate itself from the student speech involved, but it could not deny funding based on the specific ideology or opinion espoused by the student religious group.

In Rosenberger, the Supreme Court concluded that a public university could not allocate the limited financial resources available to student organizations on the basis of discriminating between the viewpoints expressed by those organizations. Specifically, the Court rejected the institution's claim that the religious viewpoint espoused by the student organization justified the denial of funding. Under this reasoning, the demand for funding must be met by the university through a method that would "allocate the scarce resources on some acceptable neutral principle."[61] Thus a public university's adherence to a standard of viewpoint neutrality would impose a duty to grant recognized student groups use of funds and facilities made available by the institution as part of an extracurricular limited open forum.

Following Rosenberger, the evolution of controversies involving student organizations moved to the question of whether a public institution, through its student government association, and with the ratification of the university governing board, can compel objecting students to pay a mandatory activity fee which funds private student organizations that engage in political or ideological speech. Mandatory fees, allocated to private student organizations that advocate viewpoints that are objectionable to the students who are compelled to pay the fees, implicate First Amendment rights of the objecting students.[62] Justice O'Connor raised this issue in her concurrence in Rosenberger, noting that a student might object to a mandatory fee by invoking a claim that "she should not be compelled to pay for speech with which she disagrees."[63]

In one of the earliest cases to address this issue, Gay and Lesbian Students Ass'n v. Gohn,[64] a federal appeals court recognized that while student organizations have a qualified right to recognition and use of public university facilities on a nondiscriminatory basis, these organizations have no clearly established right to receive university funds. However, the court found that the student senate had denied funding to a gay and lesbian student organization based on the content of the ideas that the student group wished to express, and ruled that the denial of funding violated the First Amendment.

Other precedents involving the use of mandatory student activity fees have upheld the funding of student newspapers.[65] In a Fifth Circuit Court of Appeals decision, Hays County Guardian v. Supple,[66] the federal court recognized that a university subsidy of a student newspaper was justified by the governmental interest in educating student journalists and creating a forum within the institution that would permit students to engage in the expression of differing viewpoints. In Kania v. Fordham,[67] the Fourth Circuit Court of Appeals endorsed the use of student activity fees for a campus newspaper on the basis that the newspaper contributed to the educational aims of the institution by increasing the "overall exchange of information, ideas, and opinions on the campus."[68]

The use of mandatory student activity fees to fund a particular student organization came under attack in the 1985 case of Galda v. Rutgers.[69] In that case, the federal appeals court struck down a mandatory, but refundable student fee that Rutgers University had imposed specifically for the support of the New Jersey Public Interest Research Group, an organization engaged in highly visible, largely off-campus political activity. In Carroll v. Blinken,[70] another federal appeals court upheld the State University of New York at Albany's mandatory student activity fee as applied to a Public Interest Research Group on the grounds that the policy did not violate the student's First Amendment free speech rights. The appeals court initially determined that the allocation of a part of the student activity fee to the student group served important governmental interests by fostering a marketplace of ideas on campus, providing students with educational experiences, and promoting student participation in extra-curricular activities. However, the court did find that the PRIG could not define its membership to include students who paid the mandatory fee from which the group received funding. Significantly, in further proceedings, the appeals court rejected the district court's imposition of an on-campus limitation on the use of the activity fee and affirmed a requirement that the group report annually on its projects and activities on the campus in order to insure that it spent as much money on activities at the university as it took in from student fees.[71]

The California Supreme Court addressed questions on the imposition, collection and allocation of mandatory fees that were utilized by the student senate of the student government association and agreed that the fees were a substantial burden on the First Amendment rights of the complaining students.[72] The challenged fees were allocated by the student senate and included a refund provision, however, the court directed that the Regents justify the imposition of the fee by demonstrating that the educational benefits provided by the fee-supported student activities outweighed the advancement of political or ideological interests that burdened First Amendment rights. On remand, the California Superior Court found the burden on students to be justified as providing an educational benefit that was not merely incidental to the institution's primary educational interests and sustained imposition of the fees.[73] Ironically, when the Regents then sought to refine mandatory fee policies by excluding funding for student government lobbying activities, a federal district court rejected the refinement, concluding that the educational benefits associated with other student government activities would apply equally to lobbying.[74]

In a judgment favoring the University of Oregon's mandatory student fee policy, the Ninth Circuit Court of Appeals took the position that the distribution of a portion of mandatory student activity fees to the Oregon Student Public Interest Research Group Education Fund (OSPRIG-EF) was constitutional.[75] The federal appeals court noted a number of distinctions with previous cases involving the use of mandatory fees that helped narrow the focus of the court's inquiry. First, the complaining students were not compelled to be members of the student group, nor were they required to embrace the message of the OSPIRG-EF. Second, the student group, analogous to a student newspaper, could not be regarded as the official voice of all students, nor could the OSPIRG-EF be regarded as the only voice available to students on the campus. Finally, the court noted that under the Oregon funding scheme, the OSPRIG-EF is a separate entity from the Oregon Student Public Interest Research Group. The former is the recipient of the mandatory student fee and the latter is not, "(t)hus, the Oregon system bisects political and educational functions and limits university funding to educational activities."[76]

The Ninth Circuit noted that the university had created a limited public forum encouraging a diversity of viewpoints that were germane to the university's educational purpose and "consistent with a university 'atmosphere' in which extracurricular activities constitute 'a critical part of campus life.'"[77] The federal appeals court adopted the findings of the magistrate judge that the student group "does not engage in activities utilizing professional lobbyists, door to door fundraising. . .nor does it incur administrative costs associated with such programs."[78] Accordingly, the court ruled that the student organization's activities are germane to the purpose for which the mandatory fee was imposed and it serves a legitimate governmental interest that does not violate the First Amendment rights of students who opposed its viewpoint.

Reaching a conclusion at odds with the Ninth Circuit, the Seventh Circuit Court of Appeals, in Southworth v. Grebe,[79] analogized a mandatory student activity fee to a requirement for a service fee associated with union or professional dues. Three United States Supreme Court precedents could reasonably guide the court's analysis under this analogy. In Abood v. Detroit Board of Education,[80] the United States Supreme Court held that an agency-shop agreement requiring non-union teachers to pay a service fee for collective bargaining activities was justified by the common interests of both union and non-union teachers. In Keller v. State Bar,[81] the Court held that a state bar might constitutionally fund activities germane to the common purposes of regulating the bar and improving legal services out of the mandatory dues of all members. Both these cases led to the development of a three-pronged test of germaneness applicable to such fees and articulated in Lehnert v. Ferris Faculty Association.[82]

Applying the Lehnert test of germaneness to a mandatory student activity fee at the University of Wisconsin, the Seventh Circuit asked whether the fee was germane to the institution's interest in promoting education; whether the policy was justified as a vital policy interest of the institution; and whether the governmental interest would unduly burden freedom of expression. The federal appeals court held that the university could not collect from objecting students the portion of the mandatory activity fees that supported "political and ideological activities, speech, or advocacy, whether or not the organization also provides some service in doing so."[83] On petition for rehearing, the dissent contended that diversity of viewpoint is vital to an institution of higher education's interest and suggested that the mandatory fees are allocated to the student government association, not directly to the student organizations. Given the rationale in Rosenberger, the dissent contended that the student government association must allocate the funds on a content neutral basis, thus "because the 'speech' of the individual groups cannot be attributed to the student government, it necessarily cannot be attributed to the students paying the fees to the student government."[84]

In Regents of the University of Wisconsin v. Southworth,[85] the United States Supreme Court rejected the reasoning of the Fifth Circuit, reversed the federal appeals court and remanded the case. The Court agreed that the free speech rights acknowledged in Abood and Keller were implicated in the mandatory student fee case, but gave prominence to the University's "important and substantial purposes"[86] in facilitating a wide range of student free speech. Rejecting the application of Lehnert, the majority noted that determining whether speech is germane to the mission of a union or professional association is a difficult process which is "all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas."[87]

Reasoning that facilitating student speech is central to the mission of a public university, the High Court emphasized that these institutions must be free to adopt policies designed to insure that "students have the means to engage in "dynamic discussions of philosophical, religious, scientific, social and political subjects in their extracurricular campus life outside the lecture hall."[88] The Court distinguished higher education institutions that foster extracurricular student speech from labor unions and professional associations by noting that the university seeks principally to foster the widest possible range of student speech. While safeguards are justified to protect students who object to financing certain expressive activities, the majority concluded that it was not appropriate for the courts to determine "what is or is not germane to the ideas to be pursued in an institution of higher learning."[89]

Returning to the reasoning in Rosenberger, the majority imposed a standard of viewpoint neutrality on institutions that require and allocate mandatory student fees in support of extracurricular student forums. In such forums, it is certainly probable that some students will find the views of some student organizations objectionable or offensive. However, imposing a refund system or check-off in which students designate those organizations to receive funding might so disrupt the system as to render the extracurricular forum ineffective. Since the creation of such a forum is justified by the institution's objectives in facilitating the open exchange of ideas and "enhancing the educational experience,"[90] the integrity of the institution's practice must be judged by the extent to which it adheres to the principle of neutrality in providing access and allocating funds to recognized student groups.

In the instant case, the parties stipulated that the program as developed and implemented by the university met the standard of viewpoint neutrality. This stipulation removed from consideration the question of whether the institution actually oversees and manages the program in a way that conforms to the standard, a question that may arise in the future as institutions administer policies on extracurricular student speech. However, the majority did note that a distinction between funding on-campus versus off-campus activities of student organizations would appear to be inconsistent with the institution's interest in encouraging students to become involved in the social, political, and cultural life of the local community and the larger society. While an institution is free to restrict reimbursement for travel and activities off the campus, the Court was not willing to impose "a requirement to adopt geographic or spatial restrictions" on reimbursement to recognized student organizations.

The University of Wisconsin policy also provided for funding, or denial of funding, through a student referendum. This student referendum did not appear congruent with viewpoint neutrality, and appeared to substitute a majority vote of the student body for a standard of viewpoint neutrality. Adopting, *a priori*, that the "whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views,"[91] the Court remanded the case for a determination of whether the referendum policy would undermine the Constitutionality of the university's program.

Conclusions

Public higher education institutions will remain subject to heightened judicial scrutiny whenever policies burden student First Amendment rights to free speech and association. Regulation of the forum by the institution will often hang on the characterization of a "nonpublic forum" or on carefully crafted, reasonable restrictions on time, place and manner of speech that are applicable to an open or "limited open" forum. With respect to the nonpublic forum, while courts do not readily look for evidence of viewpoint discrimination in a purportedly neutral, nonpublic forum policy, evidence of viewpoint discrimination can defeat the policy.

Institutions may designate areas that constitute "limited open forums," where members of the college or university community may express themselves freely on all subjects, within the limits of applicable laws and regulations, with or without advance notice. While some regulation of free speech will always be essential, such as dealing with a situation involving multiple speakers attempting to use a forum simultaneously, provisions should consider form and context of expression rather than the content of the speech.

Institutional permit requirements remain appropriate, but need not be rigidly enforced. The value of permitting is that location and time period are specified and the activity can be harmonized with other events on the campus. Arrangements for clean-up can be established in the permitting process, and permits can limit the time period for the activity. The permit should contain provisions requiring the holder to pay for any damage to the site and a hold harmless provision for any assessed damages or liabilities.[92]

Reasonable requirements should emphasize that the demonstration or speech activity must not create an unreasonable safety hazard, interrupt normal institutional operations, block or impede entry to any building, interfere with normal pedestrian or vehicular traffic, or inflict unreasonable damage upon landscaping. Commercial activities, such as soliciting, can be restricted effectively, but distribution of newspapers and pamphleteering present special cases in which federal courts have repeatedly recognized implications for free speech rights. Regulations should be drawn so as to distinguish between distribution of materials and commercial solicitation activities.

Recognition of student organizations, particularly in terms of access to institutional facilities and use of the forum to communicate information, is predicated on the leading precedents of Healy and Widmar.

Funding for student organizations may be decided on the basis of objective criteria (priority funding for large, on-going programs like newspapers, refusal to fund costs for office supplies, honoraria, or philanthropic contributions) and on subjective, but reasonable considerations such as educational merit and breadth of benefit to the campus community. However, denial of funding based on extrinsic considerations such as the organization's political, philosophic or religious views will implicate a content-related restriction on free speech. Federal courts have uniformly held that viewpoint discrimination will not be tolerated, whether in a public forum, limited public forum or non-public forum.

Mandatory student activity fees are constitutional if the primary function of such fees is to create and sustain a student forum where diverse viewpoints flourish and the institution maintains a viewpoint neutral role in funding the organizations within the forum. Insuring a viewpoint neutral policy with respect to these forums will be the most immediate task of higher education administrators who seek to develop and maintain student free expression.

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[1] Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 513 (1969).

[2] See, for example, Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977) in which Kent State University met the burden to justify a ban on campus assemblies in wake of campus violence and Pickings v. Bruce, 430 F.2d 595 (8th Cir. 1970) in which a student organization's charter suspension was invalidated for institution's failure to show that invited speaker would foment substantial or material disruption.

[3] 410 U.S. 667, 670 (1973).

[4] Id.

[5] 408 U.S. 169 (1972).

[6] Id. at 180.

[7] Id.

[8] See Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 800 (1985).

[9] See Alexander, "Trouble on Track Two: Incidental Regulations on Speech and Free Speech Theory," 44 Hastings L.J. 921-62 (April, 1993).

[10] 460 U.S. 37, 45-46 (1983).

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[11] Id. at 46.

[12] 406 U.S. at 46.

[13] Id. at 45.

[14] 473 U.S. 788 (1985).

[15] Id. at 802-804.

[16] Id. at 800.

[17] 454 U.S. 263 (1981).

[18] Id. at 268, n.5.

[19] See Ugland, "Hawker, Thieves and Lonely Pamphleteers: Distributing Publications in the University Marketplace," 20 J. of College and Univ. L., No. 4, 935, 940-943 (1996) for an analysis of the "marketplace" concept.

[20] Dixon, "International Society for Krishna Consciousness, Inc. v. Lee," 37 St. Louis Univ. L.J. 437, 443 (Winter, 1993).

[21] See, for example, Hays County Guardian v. Supple, 969 F.2d 111,117 (5th Cir. 1992, cert. denied, 113 S.Ct. 1067 (1993), in which the appeals court held that outside areas owned by the university were public fora; University of Utah Students Against Apartheid v. Peterson, 649 F.Supp. 1200, 1209 (D. Utah 1986), in which the court characterized the university campus as available to students and student groups as a public forum; and Glover v. Cole, 762 F.2d 1197 (4th Cir. 1985), in which the court recognized the campus as a limited public forum.

[22] See, for example, Martin-Trigona v. University of New Hampshire, 685 F.Supp. 23 (D.H.N. 1986), in which the university was free to be selective in inviting better-known presidential candidates to a debate, absent any evidence of discrimination based on political views.

[23] 269 Cal.Rptr. 882 (Cal.App. 1990).

[24] 640 F.Supp. 674 (D. Neb. 1986).

[25] Id. at 679.

[26] 858 F.Supp. 1480 (W.D.Wash. 1994).

[27] Id. at 1494.

[28] 408 U.S. at 180

[29] Trujillo v. Love, 322 F.Supp. 1266 (D.Colo. 1971); Channing Club v. Board of Regents, 317 F.Supp. 688 (N.D. Tex. 1970); and Antonelli v. Hammond, 308 F.Supp. 1329 (D.Mass. 1970).

[30] See Shamloo v. Mississippi State Bd. of Trustees, 620 F.2d 516 (5th Cir. 1980); in which institution's prior review regulation prohibiting student demonstrations that were not of a "wholesome nature" violated overbreadth under First Amendment.

[31] Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970); Stacy v. William, 306 F.Supp. 963 (N.D.Miss. 1969), aff'd mem., 446 F.2d 1366 (5th Cir. 1971; and Smith v. University of Tennessee, 300 F.Supp. 777 (E.D. Tenn. 1969).

[32] Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976).

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[33] See Healy v. James, 408 U.S. 169, 180.

[34] See Texas v. Johnson, 491 U.S. 397 (1989) in which the United States Supreme Court held that a Texas statute criminalizing the burning of the American flag was unconstitutional on the basis that the state may not prohibit expression of an idea simply because the larger society disagrees with the idea.

[35] See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[36] See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[37] See Miller v. California, 413 U.S. 15 (1973).

[38] 762 F.2d 1197 (4th Cir. 1985).

[39] See Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992).

[40] 659 F.Supp. 1239 (W.D.Tex. 1987).

[41] Dambroth v. Central Michigan Univ., 555 F.3d 1177 (6th Cir. 1995); UWM Post, Inc. v. Board of Regents, 774 F.Supp. 1163 (E.D.Wis. 1991); and Doe v. University of Michigan, 721 F.Supp. 852 (E.D.Mich. 1989).

[42] 113 S.Ct. 2194 (1993).

[43] See Kaplan and Lee, The Law of Higher Education (3rd ed., 1995), pp. 514-516 for suggested institutional regulations that may address elements of hate speech.

[44] See American Futures Systems v. Pennsylvania State Univ. 618 F.2d 252 (3rd Cir. 1980); 688 F.2d 907 (3rd Cir. 1982; 752 F.2d 854 (3rd Cir. 1984, cert. denied 473 U.S. 911 (1985) and American Futures Systems v. State Univ. of New York at Cortland, 565 F.Supp. 754 (N.D.N.Y. 1983).

[45] 492 U.S. 1169 (1989), on remand 42 F.3d 135 (2nd Cir. 1994), cert. denied, 515 U.S. 1169 (1995).

[46] Id. at 472.

[47] 491 U.S. 781 (1989).

[48] Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981).

[49] Board of Trustees v. Fox, 492 U.S. 469, 473 (1989).

[50] Ward v. Rock Against Racism, 109 S.Ct. 2746, 2758 (1989).

[51] 969 F.2d 111 (5th Cir. 1992).

[52] Id. at 118-119.

[53] Id. at 121. But see Texas Review Soc. v. Cunningham, 659 F.Supp. 1239, 1245-46 (W.D.Tex. 1987) in which the court found a similar restriction to be reasonable and narrowly tailored to serve a significant governmental interest and Chapman v. Thomas, 743 F.2d 1056 (4th Cir. 1984), cert. denied, 471 U.S. 1004 (1985) in which an evangelist was prohibited from soliciting door to door in a residence hall on the basis that the facility was not a public forum.

[54] 649 F.Supp. 1200 (D.Utah 1986).

[55] 838 F.2d 735 (4th Cir. 1988).

[56] 468 U.S. 288 (1984).

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[57] See, generally, Gay Lesbian/Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); and Gay Student Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974).

[58] 454 U.S. 263.

[59] 737 F.2d 1317 (5th Cir. 1984).

[60] 115 S.Ct. 2510 (1995).

[61] Id. at 2518.

[62] See Whitehead and Block, "Mandatory Student Fees: Forcing some to Pay for the Free speech of Others," 20 Whittier L. Rev. 759-781 (1999).

[63] 115 S.Ct. at 2524.

[64] 850 F.2d 361 (8th Cir. 1988).

[65] One comment has questioned whether student newspapers could retain their institutional funding if Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998) is affirmed by the United States Supreme Court. See Mawdsley and Permuth, "Mandatory Student Fees and Free Speech,"132 Ed.Law Rep. 265 (April 15, 1999).

[66] 969 F.2d 111 (5th Cir. 1992), cert. denied, 506 U.S. 1087 (1993).

[67] 702 F.2d 475 (4th Cir. 1983).

[68] Id. at 480.

[69] 772 F.2d 1060 (3rd Cir. 1985, cert. denied, 475 U.S. 1065 (1986).

[70] 957 F.2d 991 (2nd Cir. 1985), cert. denied, 506 U.S. 906 (1992), further proceedings, 42 F.3d 122 (2nd Cir. 1994).

[71] Carroll v. Blinken, 42 F.3d 122 (2nd Cir. 1994).

[72] Smith v. Regents of the Univ. of Cal., 844 P.2d 500 (Cal. 1993) cert. denied, 510 U.S. 863 (1993), further proceedings, 65 Cal. Rptr. 2d 813, (Ct. App. 1997).

[73] Smith v. Regents of the Univ. of Cal., 65 Cal. Rptr. 2d 813 (Ct. App. 1997).

[74] Associated Students of the Univ. of Cal. at Riverside v. Regents, --- F.Supp.--- (N.D.Cal. 1999).

[75] Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032 (9th Cir. 1999).

[76] Id. at 1038.

[77] Id. at 1039, citing Widmar, 454 U.S. 263, 297 n. 2 (Stevens, J., concurring).

[78] Id. at 1040.

[79] 151 F.3d 717 (7th Cir. 1998), cert. granted sub nom. Board of Regents v. Southworth, 119 S.Ct. 1332 (1999).

[80] 431 U.S. 209 (1977).

[81] 496 U.S. 1 (1990).

[82] 500 U.S. 507 (1991).

[83] 151 F.3d at 734.

[84] Southworth v. Grebe, 157 F.3d 1124, 1125 (Rovner, J., dissenting).

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[85] 529 U.S. ___ (2000).

[86] Id. at .

[87] Id. at .

[88] Id.

[89] Id.

[90] Id. at . The University stipulated the fees promote extracurricular activities, stimulate advocacy and debate, enable political participation, and provide opportunities to develop social skills.

[91] Id. at .

[92] For a useful discussion of symbolic speech issues and institutional policies, see Firmage, "The Shanties, Symbolic Speech and the Public Forum," Utah L.R. 503-542, No. 3, Spring, 1990.

Developments in Church/State/School Relations: A More Accommodating Establishment Clause?

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Education Law Association
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Developments in Church/State/School Relations: A More Accommodating Establishment Clause?

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This presentation and paper focus on two seminal Supreme Court decisions rendered in June, 2000: *Santa Fe Independent School District v. Doe* and *Mitchell v. Helms*. Although handed down only nine days apart, the Court's reasoning in the two cases is difficult to reconcile, suggesting that the Court is heading down two divergent paths in interpreting Establishment Clause restrictions on government action. A majority of the Court seems to support government accommodation of religion in connection with public aid flowing to parochial schools, whereas a different majority (with some overlap) seems protective of church/state separation regarding devotional activities in public education. Thus, application of the Establishment Clause appears to differ depending on whether the contested practices involve public or private schools. Although some commentators assert that the two lines of cases are internally consistent, a stable pattern seems more apparent in the cases involving government aid to parochial schools than in litigation concerning religious observances in public education.

The two recent decisions and their implications for Establishment Clause doctrine as well as for school policies and practices are explored. Particular attention is given to changes over time in how the Supreme Court has applied the neutrality principle in school controversies.

I. Santa Fe Independent School District v. Doe, 120 S. Ct. 2266 (2000) (striking down student elections to authorize student-led invocations before public school football games)

A. Context
    1. Litigative history in the case
    2. School district's prior activities regarding religious observances
B. Majority Opinion
    1. Limits on delegating decisions to students regarding student-led devotionals
    2. Private versus school-sponsored religious expression in public schools
C. Dissenting Opinion
    1. Asserted hostility toward religion
    2. Free Speech Clause protections
D. Comparison with other decisions, e.g.,
    1. Board of Regents of University of Wisconsin System v. Southworth, 120 S. Ct. 1346 (2000) (upholding a state university's mandatory student activity fees and requiring viewpoint neutrality in their distribution)
    2. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) (invalidating state university's policy that entailed discrimination against religious viewpoints in distribution of student activity

funds for student publications)
3. Lee v. Weisman, 505 U.S. 577 (1992) (striking down clergy-led graduation prayer)
4. Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) (rejecting Establishment Clause challenge to the Equal Access Act that prohibits federally assisted secondary schools with a limited forum for noncurriculum student groups to meet from discriminating against particular groups because of the religious, philosophical, or political content of their meetings)
5. Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down Alabama's silent prayer statute as designed to encourage students to pray in public schools)
6. Adler v. Duval County School Board, 206 F.3d 1070 (11th Cir. 2000), *petition for cert. filed* May 22, 2000 (upholding school district's policy allowing students to select their graduation messages)
7. Chandler v. James, 180 F.3d 1254 (11th Cir. 1999) (relying on the Free Speech Clause to lift an injunction on student-initiated religious expression in school-related activities), *vacated and remanded (for reconsideration in light of Santa Fe v. Doe)*, 120 S. Ct. 2714 (2000)
8. Peck v. Upshur County Board of Education, 155 F.3d 274 (4th Cir. 1998) (using free speech protections to uphold a school policy designating a day for political and religious groups, such as the Gideons, to distribute their literature in public schools, as these private groups do not represent the public school)
9. Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (upholding student election to determine whether to have student-led graduation invocations and benedictions).

E. Responses to the *Santa Fe* ruling from conservative citizen groups, school districts, and professional education organizations

II. Mitchell v. Helms, 120 S. Ct. 1230 (2000) (upholding use of federal funds to supply computers and other instructional equipment and materials for students in parochial schools)

A. Context
   1. Legislative history of the challenged federal provision
   2. Litigative history in the case
B. Plurality opinion
   1. Application of the neutrality principle
   2. Importance of public funds passing through private hands
   3. Evenhanded distribution of the aid without regard to religion
   4. Modified *Lemon* test
C. Concurring opinion
   1. Problems with singular importance given to neutrality principle
   2. Divertibility of aid for religious purposes
D. Dissenting opinion

    1. Neutrality principle misapplied
    2. Aid that supplants private school funds
    3. Aid to pervasively sectarian institutions

E. Comparison with other rulings, e.g.,
    1. Agostini v. Felton, 521 U.S. 203 (1997) (upholding the use of public school personnel to provide remedial services in religious schools)
    2. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) (striking down legislation creating a school district for religious reasons)
    3. Zobrest v. Catalina Foothills School Distrist, 509 U.S. 1 (1993) (upholding the use of public funds to support sign language interpreters for students attending religious schools)
    4. Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) (upholding use of federal vocational rehabilitation aid to support ministerial training)
    5. School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) (striking down shared time and community education programs involving publicly financed classes for parochial school students on sectarian school premises)
    6. Aguilar v. Felton, 473 U.S. 402 (1985) (striking down the use of public school personnel to provide Title I services to students on parochial school grounds)
    7. Mueller v. Allen, 463 U.S. 388 (1983) (upholding state tax benefit for educational expenses available to parents of public and private school students)
    8. Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding governmental aid for state-mandated testing and record-keeping practices)
    9. Wolman v. Walter, 433 U.S. 229 (1977) (striking down use of public funds for remedial, guidance, and therapeutic services provided on parochial school grounds and for instructional materials and equipment, standardized tests, and field trip transportation for students in parochial schools)
    10. Meek v. Pittenger, 421 U.S. 349 (1975) (striking down use of public funds for instructional materials and equipment and provision of auxiliary services in parochial schools)
    11. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (striking down direct grants for maintenance and repair of private school facilities, reimbursement to parents for private school tuition, and tax benefits for parents of private school students)
    12. Lemon v. Kurtzman, 403 U.S. 602 (1971) (striking down state laws providing aid to sectarian schools and their teachers in connection with secular instructional activities)
    13. Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449 (9th Cir. 1995) (upholding use of Chapter 2 funds to provide instructional equipment and materials for students in parochial schools)

III. Implications

A. Are judicial interpretations of the two strands of Establishment Clause cases (i.e., state aid to parochial schools and religious observances in public schools) internally consistent?

B. Can private actors serve as circuit breakers to eliminate Establishment Clause concerns? Are parents, but not students, private actors?

C. Is there a hierarchy between Free Speech Clause protections and Establishment Clause restrictions?

D. Were cases involving state aid to parochial schools rendered in the 1970s anomalies?

E. Are public schools the last bastion of separationist doctrine?

F. Given *Helms*, are voucher programs under which parents receive state-funded vouchers that can be redeemed at public or private schools likely to be upheld?

G. Given *Santa Fe*, are student-initiated and led graduation prayers likely to be upheld?

H. Does the Establishment Clause still have vitality in school cases?

The full paper will be distributed at the session.

Higher Education and Affirmative Action

Constitutional Infirmities: *Recent Court Decisions on Affirmative Action and Race-Based Preferences*

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CONSTITUTIONAL INFIRMITIES: RECENT COURT DECISIONS ON AFFIRMATIVE ACTION AND RACE BASED PREFERENCES

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The Educational Law Association
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Introduction

There is little doubt that a new era in providing equal access to higher education by minorities has begun in America. The seeds that were sown in 1978's *California Board of Regents v. Bakke*[1] decision came to bear fruit with 1995's *Hopwood v. Texas*[2] ruling that race (and gender) considerations constituted "quotas" and "set asides" and were impermissible in higher education admissions. The floodgates opened as racial and gender preferences were cited as "constitutional infirmities" and prohibited in such other areas as hiring, scholarship, and state contracts.

America has had a long history of providing minorities with education of some sort whether good or bad, segregated or integrated. From the segregated schools of the South (and North), "charity schools" for freed slaves in 1770 Philadelphia, 1787 New York, and 1792 Baltimore, to the agricultural and technical schools of the 19th and 20th centuries, to busing, redistricting, and following the 1964 Civil Rights Act, actual numbers of guaranteed "seats", again our country finds itself at a crossroads when answering questions about how best to recruit, retain, and promote the education of our citizens of color. Prior to the 1800s, schools were maintained for only the wealthy, well connected, or pre-clergy. The common school movement promoted the connection between the success of democracy and what Thomas Jefferson called the "educated citizenry".

The common school system was set up to not just to fill occupational needs of the emerging nation, but to equalize the tremendous disparity in wealth, literacy, social life, and intellectual development of its citizens. Thousands of towns of freed slaves, illiterate immigrant ghettoes, and huge Northern cities teemed with uneducated children, many trying to enter the labor market. "At the beginning of the 19th century, no law or tradition excluded black children from the public schools. Some did attend public schools and some attended private schools," wrote Joel Spring.[3] However, due to vitriolic prejudice, most blacks opted for their own schools yet waited for the time when they could return to the quality education afforded to non-minorities. It was a nearly two hundred year wait.

Not that various Presidents didn't try. Few people realize that presidential intervention to secure access to education by blacks and minorities (especially in the South) dated as far back as President Ulysses S. Grant who fought along side black soldiers in the Civil War. His civil career focused on a divine belief in guaranteeing the rights of blacks by aggressive prosecution of the newly emerging Ku Klux Klan "who sought to suppress schools in which colored children were taught..."[4] Much of the struggle centered around black education in the South. Many whites feared that the set asides for black political participation during Reconstruction would make its way into other areas such as education, housing, and labor.

With the signing of the Civil Rights Act of 1965, controversy has surrounded equality and the use of racial (and gender) preferences in: 1) education admissions and scholarships, 2) hiring and promotion in the public and private sectors, and 3) the awarding of state contracts or companies doing business with the state. Research for this paper reveals that racial and gender preferences that have been established for any one of those three contexts, have generally applied to the others. Conversely, the repeal of race based preferences have followed suit from *Bakke* and *Hopwood* in educational admissions to *Adarand v. Pena*[5] in state contracts and decisions affecting affirmative action in other contexts.

Origins of Contemporary Race Based Quotas

Excluding affirmative action programs following the Civil War, the very first contemporary affirmative action case to use racial quotas in college admissions, hiring/ promotion in the business sector, or awarding of government contracts appears to be from the Nixon era. In 1969, Arthur Fletcher, President Nixon's assistant secretary of labor, examined why, for all their academic and business qualifications, degreed minorities (specifically blacks) had little access to higher paying jobs, union assignments, or corporate offices. He unearthed the Philadelphia Plan, an affirmative action plan for businesses that was written up shortly after the Civil Rights Act of 1965 by the "Johnson Administration to integrate the construction trades in Philadelphia. It would have required low bidders on federal contracts to show plans for hiring minority workers in skilled trades. But it had been abandoned amid complications over quotas and bidding procedures."[6]

Nixon allowed Fletcher to announce the Plan publicly on June 27, 1969 and St. George reported that the speech was received poorly by Philadelphians and less so by such senators as Sam Ervin (D-North Carolina) who denounced the Plan as an illegal quota system that forced discrimination towards union members. He vigorously tried to deny funding but in the end, Ervin had not enough votes necessary to defeat the bill and by Christmas, Fletcher had an instrument that reserved guaranteed work and awarding of contracts solely on the basis of race. Ironically, the issue split Republicans as much as it did Democrats.

Other early decisions approving the constitutionality of racial considerations include race-based decisions in making school assignment decisions as in *Swann v. Charlotte-Mecklenberg Bd. of Education.*[7] These racial considerations were generally tied to remedy past discrimination as discussed in *Green v. County School Board.*[8] However, Justice Marshall also pointed out that Title VI of the Civil Rights Act as interpreted by the Department of Health, Education, and Welfare and approved by the President authorized "a federally funded institution to take affirmative steps to overcome past discrimination against groups *even where the institution was not guilty of prior discrimination.*"[9] Justice Marshall extended this ruling to higher education writing that "There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of discrimination."[10]

Regardless of where the first affirmative action program occurred, since *Brown v. Bd. of Education in 1954,*[11] it is axiomatic to say that we have been consumed in providing a system that ensures equal access and a more level playing field for minorities, especially African-Americans. Since the 1960s, the main tools have been Head Start, busing, and remedial/enrichment classes for K-12 and affirmative action programs with race based preferences for higher education admissions (which is the scope of this paper). However, as this paper will demonstrate, a variety of courts from local to Supreme Court have been very specific in negating race and gender based considerations in college admissions applications for a number of reasons.

Out of all the district, state, federal, and Supreme Court opinions, this research shows that the most prevalent objections to race based preferences in Affirmative Action center on the constitutionality of racial quotas as a compelling interest for the purpose of diversity, severe disparity in admissions standards and a lack of absolute standards for minority applicants, de facto segregated administration and evaluation of such programs - the focus of this paper. Other areas include difficulties in nomenclature of minority status, and special circumstances that invited lawsuits from aggrieved parties charging reverse discrimination - issues that will be addressed in a later paper. As this paper will show, the demise of race based preferences in affirmative action programs is not just a 14th Amendment issue, but an issue of structuring those race based formulas and their real life applications.

Constitutionality and Compelling Interest of Diversity

It is commonly accepted in academic circles that a diverse student body, faculty, staff, and administration is central to a college's mission. All colleges have mission statements to the effect that they provide a diverse intellectual body. They coincide neatly with the objectives of affirmative action which have always been to compel the state to 1) overcome the effects of past discrimination, 2) ensure against future discrimination, 3) to promote diversity, 4) to overcome a two-class society characterized by racial divisions, and 5) to provide equitable distribution of economic resources.[12]

However, as Justice Powell wrote for the majority opinion in *Bakke*, "It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's arguments that this is the only effective means of serving the interest of diversity is seriously flawed...petitioners special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity."[13]

Justice Marshall's dissent in *Bakke* was eloquent. He pointed out that throughout the past 200 years, the Constitution had been interpreted for "the most ingenious and pervasive forms of discrimination against the Negro."[14] He talked of his race being "dragged to this country in chains...bondage for forced labor...perpetuation of a system that deprived a whole race of their rights...the Negro as property...legal inferiority...the little value of freedom..."[15] He also made reference to federally enforced segregation, and the imposition of frightening almost Kafkaesque laws.

Though Title VI of the Civil Rights Act of 1964[16] claimed that no one on the basis of race or color could be excluded from participating in any program receiving federal financial assistance, Justice Powell determined that the University of California-Davis program of diversity through racial quotas "tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class and. . . they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats."[17]

At the time, most scholars believed that Justice Powell's grand compromise allowing racial preferences in higher education admissions was "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[18] However, the impact of the *Bakke* case was to establish that actual racial classifications and numerical quotas could be challenged as invalid forms of 14th Amendment protection.

Diversity as a compelling interest was also now subject to a far closer scrutiny under the Rehnquist court because ". . . Although institutions of higher education have a compelling interest in achieving educational diversity, amicus recognize that the strength of that interest, in and of itself, will not justify every practice or policy for taking race into account. Specifically the means an institution adopts must be narrowly tailored to achieving the compelling interest."[19] This is vastly different than the "looser" interpretations of Justices Warren, Berger, Douglas, and Marshall, because, as Justice Powell wrote, "Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny."[20] However, Justice Stevens in concurrence said that this applied only to the *Bakke* case and that is why race based admissions preferences continued until *Hopwood v. Texas* in 1994.

For several centuries, equal protection in the form of race-based affirmative action has not been endorsed. Justice Brown wrote that "our Constitution is color blind."[21] And Justice Jackson stated in *Edwards v. California*, ". . . differences in color, creed, birth, or status are not significant nor relevant."[22] Yet the dissenting justices in *Bakke* citing from *McLaughlin v. Florida*, found an "overriding statutory purpose...for racial classifications."[23] Justice Brennan concluded, "No decision of this court has ever adopted the proposition that the Constitution must be colorblind..." and ". . . we conclude, therefore, that racial classifications are not *per se* invalid under the 14th Amendment to the Constitution."[24]

In *Hopwood*, the Fifth Circuit ruled that the law school had presented "no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalances in the student body."[25] Citing the Equal Protection Clause as making race irrelevant in government decision-making, the court furthermore labeled race based affirmative action as discrimination that was highly suspect and "odious to free people."[26] Such quotas were also prohibited as an actual quota and set aside which, as Justice Powell pointed out in *Bakke*, was unconstitutional, even when benign or remedial. The circuit court called for close scrutiny of the diversity as compelling interest argument even in the face of the state university's "bad reputation as unrepresenting minorities and allegedly being hostile to minorities were not sufficient to sustain university's use of race in admissions process in the face of an equal protection challenge by non-minority applicants."[27]

The Fifth Circuit reversed the district court's ruling that found a "compelling remedial and non-remedial justification for the practice."[28] Though the court cited Justice Powell's opinion in *Bakke* that recognized diversity as a compelling state interest, it also cited Justice Powell's admonition that race based considerations to counter the effects of past discrimination as well as the promotion of role models were never appropriate. Remedial justification in the form of reservation of admission seats for minority groups or groups designated as economically and/or educationally disadvantaged was appropriate only to eliminate "identified discrimination" with "disabling effects". The circuit court, though mentioning a history of poor minority access to the University of Texas system, found no current pattern of discrimination strong enough to meet that strict scrutiny standard.

Differences in the Evaluation of Each Applicant Class

Beyond the issue of diversity as a compelling interest, the courts in *Bakke* and *Hopwood* both pointed out that each applicant class was treated differently and thus unconstitutionally. Citing the ruling in *Adarand v. Pena* on the presumptive unconstitutionality of racial classification, the Fifth Circuit in *Hopwood* ruled that strict scrutiny be applied in the use of racial classifications.

In *Bakke*, the trial court ruled that the special admissions program for people who considered themselves disadvantaged "operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them."[29] It was also pointed out that a majority of special admissions program evaluators were minority status themselves and though the University contended that the program operated for economically disadvantaged students, the fact that no economically disadvantaged whites were admitted via the special admissions procedures was not lost on the Supreme Court.

The plaintiff in *Bakke* was ordered admitted not just because he was not given fair consideration in the general applicant pool, but also because he was not considered for the special admissions program on the basis of race as well as the separate, and vastly different standards to which each applicant class was held. Under the general applicant class, the plaintiff just barely missed the presumptive admissions cutoff but would have been given the chance to gain admittance in the discretionary category. Minority applicants, who would have scored in the presumptive denial category for general applicants, scored in the presumptive admission range for special admissions and gained admissions with lower overall scores than the plaintiff. According to the court, his exclusion was solely on the basis of race.

In *Hopwood*, the same disparate situation was pointed out. Among the non-minority applicants, "applications in the middle range were subjected to the most extensive scrutiny."[30] Yet blacks and Mexican-Americans had significantly lower scores required for presumptive admission[31] while the cutoff scores for presumptive deny were more disparate.[32] The court stated that the differences in the two ranges were dramatic and greatly affected the applicant's chances of admission.

"For example, by March 1992, because the presumptive *denial* scores for whites was a TI of 192 or lower, and the presumptive *admit* TI for minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be *admitted* even though his score was considerably below the level at which a white candidate almost certainly would be *rejected*."[33] The appeals court also pointed out that the reality of these numbers were clear. In the 189-192 TI score range, 100% of blacks, 90% of Mexican-Americans were offered admission, but only 6% of whites. It was not just the lower scores, but also the fact that absolute standards existed for non-minority applicants, while for minority candidates, the admissions committee could reach whatever lower score they needed to ensure a racially diverse student body.

The court also surmised that the University of Texas maintained an unacceptably segregated applicant process. Beginning with the separate presumptive admission score levels for minorities and whites, the applicants forms were color-coded according to race, reviewed with different levels of consideration, and the finality of recommendations from the virtually segregated application committees was noted. Additionally, "the law school maintained segregated waiting lists, dividing applicants by race and residence. Thus, even many of those minority applicants who were not admitted could be set aside in 'minority only' waiting lists. Such separate lists apparently helped the law school maintain a pool of potentially acceptable, but marginal, minority candidates."[34]

Racial Preferences in K-12

Obviously, K-12 administrators must be aware that admissions policies involving racial classifications for diversity purposes will be subject to lawsuits. In *Tito v. Arlington County School Board*,[35] a district court concluded that diversity could never be a compelling state interest and permanently enjoined the Arlington Traditional School from implementing their admissions school policy that was based in part on racial preferences to achieve diversity.

Concerned with policies that may not be narrowly tailored to suit strict scrutiny standards, in the subsequent appeal the court held that the School Board's policy violated the Equal Protection Clause of the 14th Amendment and that the classification scheme for admissions, weighting specific factors such as low income or special family background, English as the first or second language, the racial or ethnic group of the applicant in a lottery selection procedure for oversubscribed admissions, was not tailored narrowly enough.[36] The School Board argued that race cannot be divorced from income and language factors but the court disagreed on the basis that non-remedial racial balancing was unconstitutional.

Also, the court ruled that this admission's policy "had no logical stopping point" and thus was not narrowly tailored as argued in *City of Richmond v. Crosson*.[37] Despite the School Board's contention that the deviation in the lottery process minimized the effect of race, the court ruled that the selection process did in fact, skew the odds of selection in favor of certain minorities. The court also said that racial balancing was not needed to achieve educational benefits of diversity to students. Finally, the court pointed out a very cogent difference between constitutionally permitted programs which treated each applicant individually in the admissions process, such as Harvard University, and ones that grant preferential treatment solely on the basis of race such as the Arlington School Board's lottery for remaining admissions seats being adjusted according to their stated race.

Conclusion

Change has come. Even in the light of the Grand Compromise sought by Justice Powell, the acceptability for race-based preferences for diversity purposes in *Bakke* was fleeting. The same decision that brought the general principle of constitutionality also pointed out that racial preferences were "inherently suspect". It was only a matter of time before a vastly different Supreme Court would apply that far stricter scrutiny of racial preferences.

In pursuit of a "robust exchange of ideas" and a "diverse student body" with a constitutionally permissible goal of race-conscious university admissions programs, it is obvious that race based policies have to be tailored very narrowly and very specifically to be considered not discriminatory to non-minority applicants. As this paper has demonstrated, the demise of race based preferences in affirmative action programs is not just a 14th Amendment issue, but an issue of structuring those race based formulas and their real life application.

For an admissions, hiring, or state contracting program to pass constitutional muster, it must have some supportable compelling interest, such as to remedy immediate and definable past discrimination, must be narrowly tailored to criteria outside of race and ethnic background, such as low income or educationally disadvantaged, and also be flexible enough to include special cases outside of racial and ethnic classifications. In other words, no matter how impassioned or academic the arguments, an admissions program using race-based preferences must be directed towards specific discrimination activities and not just presumed or derived generalities about the state of access and affordability by minorities.[38]

Additionally, no matter how an admissions program removes race from its selection procedure, the final results cannot be a de facto racially based preference system. If the selection procedure is based on low-income factors, non-minority low-income applicants must be admitted in appropriate proportions to minority groups. Holding seats open for racial and ethnic groups as well as not filling them when a minority applicant pool is insufficient (whether for number of applicants or for not meeting standards) is now a constitutionally suspect activity.

While few people argue that diversity is necessary for a healthy educational experience, the courts have been very clear that race-based preferences are a "constitutional infirmity." Recently, the University of Florida admissions department reported that minority applications and acceptance have increased significantly. Governor Jeb Bush claims credit through his One Florida Plan that ensures admission to the top 20% of each high school graduating class however, it can be argued that recruitment and retention programs are now the critical factor in ensuring successful minority recruitment.

From Head Start in pre-kindergarten to college reach out programs for middle school students to other initiatives that encourage educationally disadvantaged students to think of college, help remediate their academic deficits, and enrich their overall learning abilities, such programs have been proven to increase minority interest in applying to college. They also increase the likelihood of minority applicants being accepted to an accredited college, and finding success once they are admitted. Best of all, they are constitutional under current case law.

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[1] *Regents of the University of California v. Bakke*, 438 U.S. 265, at 320, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

[2] 78 F. 3d 932 (5th cir. 1996).

[3] Joel Spring, *The American School,* at 57 (1986).

[4] Ulysses S. Grant, *Personal Memoirs of U.S. Grant* (1885).

[5] 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

[6] Donna St. George, *Arthur Fletcher: Out of Another Era Comes a Champion of Affirmative Action, Waging a Little Noticed Campaign to Preserve his Legacy*, Philadelphia Inquirer, November 12, 1995, Features Section at 6.

[7] 402 U.S. 1, at 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

[8] 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

[9] 438 U.S., at 399-400 (emphasis added).

[10] *Id.*

[11] 347 U.S. 483, 74 S.Ct. 686 (1954).

[12] Brian Landsberg, *Affirmative Action. What is the Law?* Paper presented at the Annual Education Conference of the California School Boards Association, Long Beach, CA November 30-December 3, 1995. Available through ERIC document ED391248.

[13] 438 U.S., at 315.

[14] *Id.*, at 388.

[15] *Id.* At 389-90.

[16] 42 U.S.C.A. § 2000.

[17] 438 U.S., at 319.

[18] *Id.*, at 320.

[19] *Id.*, at 315.

[20] *Id.*, at 267.

[21] *Plessy v. Ferguson*, 163 U.S. 537, at 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

[22] 314 U.S. 160, at 185, 62 S.Ct. 164, 86 L.Ed. 119 (1941).

[23] 379 U.S. 184, at 192, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964).

[24] 438 U.S., at 356.

[25] 78 F.3d, at 934.

[26] Citing *Hirabayashi v. United States*, 320 U.S. 81, at 100, 63 S. Ct. 1375, at 1385, 87 L.Ed. 1774 (1943).

[27] 78 F.3d, at 933.

[28] *Id.*, at 941.

[29] 438 U.S., at 266.

[30] 78 F.3d, at 936.

[31] TI ranges of 199 for non-minorities, 189 for minorities.

[32] 192 vs. 179.

[33] *Id.*, at 937.

[34] *Id.*, at 938.

[35] Unpublished decision cited in the appeal.

[36] *Tuttle v. Arlington*, 189 F.3d 431 (1999).

[37] 488 U.S. 469, at 498 (1989).

[38] See, e.g., Justice Marshall's dissent in *Bakke, supra.*, or the amicus brief in *Grutter v. Bollinger*, 188 F.3d 394, 137 Ed. Law Rep. 907, 1999 Fed.App. 0295P (6th Cir. 1999).

POLICY ISSUES IN UNIVERSITY OF MICHIGAN CASE

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46th Annual Education Law Association Conference
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Policy Issues in University of Michigan Case
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I. INTRODUCTION - Affirmative Action in Higher Education

II Historical Context - Remedy for Past Acts

Sweatt v. *Painter*,
339 U.S. 629 (1950)

Brown v. *Board of Educ.*,
347 U.S. 483 (1954)

III. Bakke' and its Progeny

Regents of Univ. of Cal. v. *Bakke*,
438 U.S. 265 (1978)

Adarand Constructors, Inc. v. *Pena*,
515 U.S. 200 (1995)

City of Richmond v. *J.A. Croson Co.*,
488 U.S. 469 (1989)

Metro Broadcasting, Inc. v. *Federal Communications Comm n*,
497 U.S. 547 (1990)

IV. Affirmative Action in Higher Education in Texas, California and Florida - *Is Affirmative Action Dead ?*

Hopwood v. State of Texas
78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S.Ct. 2582 (1996)

V. Current Argument - Diversity Itself being a "Compelling State Interest"

University of Michigan Lawsuits

A. The Parties

Gratz v. Bollinger, et. al - filed on October 13, 1997 - pending before Judge Patrick Duggan. It challenges the University''s use of race in its admission process to the undergraduate college of Literature, Science & the Arts. It is brought by Jennifer Gratz, an unsuccessful applicant for the 1995 Fall Term, and Patrick Hamacher, an unsuccessful applicant for the 1997 Fall Term.

Grutter v. Bollinger, et. al - filed on December 3, 1997 - pending before Judge Bernard Friedman. It challenges the University''s use of race in its admissions process at the Law School and is brought by Barbara Grutter, an unsuccessful applicant for the 1997 Fall entering class.

The plaintiffs are suing the University and specific University officials in their individual and official capacities. Both cases have been certified as class actions. A number of groups and organizations have filed amicus briefs.

The Dispute

The plaintiffs position is that the University's admissions practices unlawfully discriminate against them, because the University takes race and ethnicity into account as a “““plus””” factor among many factors in its admissions process. In general, they seek injunctive relief, and monetary damages.

The University's position is that the Constitution and civil rights statutes, as interpreted by the Supreme Court in the 1978 Bakke decision, permit it to take race and ethnicity into account in its admissions program in order to achieve the educational benefits of a diverse student body. A racially diverse student body produces significant educational benefits because of the current state of segregation and separation along racial lines in America. These benefits constitute a “““compelling governmental interest””” which justifies the consideration of race and ethnicity in the University''s admissions system.

VI. DISCUSSION

1. May we use race as a “Competitive Consideration” in University Admissions Policies ?

1. Is a “Properly Devised Admissions Program Involving the Competitive Consideration of Race and Ethnic Origin" Constitutional ?

1. Is Diversity Is a Compelling Interest in the Context of University Admissions ?

1. Are there any limitations in Bakke ?

1. Is *Bakke* binding precedent - Supreme Court / Sixth Circuit ?

1. Is is possible to achieve meaningful diversity with the consideration of race and ethnicity as one of many factors in admissions ?

VII. POLICY CONSIDERATIONS

1. Does consideration of race in university admissions further a compelling interest

in educating students and training them to function in the global marketplace ?

1. Do Institutions of Higher Education Have A Compelling Interest In Selecting Diverse Student Bodies ?

1. Does High-Level Functioning in Today's Business World Demand Cross-Cultural Competence and the Ability to View Problems from Multiple Perspectives Skills Best Learned In Diverse Academic Environments ?

1. To achieve excellence in the new, diverse global economy, must high-level employees of any race, culture, or ethnicity possess cross-cultural competence ?

1. Does Diversity in academic institutions augments the skills cross-cultural competence and complex thinking that students need to help lead our country's economic future ?

1. Can only institutions of higher learning provide the exposure to diversity, development of cross-cultural competence, and critical thinking skills that graduates need to thrive in the business world ?

1. Does elimination of affirmative action in educational institutions deprive businesses of well-trained minority candidates who are essential to our nation's economic success ?

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RETHINKING AFFIRMATIVE ACTION: REDEFINING COMPELLING STATE INTEREST AND MERIT IN ADMISSION

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Rethinking Affirmative Action: Redefining Compelling State Interest and Merit in Admission

By: Robert M. Hendrickson

Affirmative action is under attack from those who believe that the Constitution of the United States Equal Protection Clause mandates a race neutral or totally color blind admissions process. Some states have passed initiatives which outlaw the use of race in the admission decision and a United States Court of Appeals held that race could not be used in the admissions process rejecting a previous Supreme Court decision. Surrounding this controversy is the search for clear definitions equity, diversity, strict scrutiny, compelling state interest, and merit. This paper is a continuation of previous work by the author (Hendrickson 1996, 1999) exploring this controversy as it continues to develop. A review of the case law will help to clarify these definitions. The presenter will revisit the *Bakke* decision on what constitutes a compelling state interest and explore the way merit is conceived and operationalized.

Historical Evolution of Equity

Separate but Equal Programs or Facilities

Plessy v. Fegruson, 163 U.S. 537 (1896).

Admissions cases (African Americans request separate but equal legal education) move the Court toward equity.

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

Epps v. Carmichael, 93 F. Supp. 327 (M.D.N.C. 1950), rev'd , *McKissick v. Carmichael,* 187 F.2d 919 (4th Cir. 1951).

Sweatt v. Painter, 339 U.S. 629 (1950).

McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

Concept of equity and integration

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Affirmative Action as the Vehicle to achieve Equity

The Civil Rights Act of 1964 particularly Title VI and Title VII resulted in the evolution of the concept of affirmative action through both the Office of Civil Rights (enforcement of Title VI) and the Equal Employment Opportunities Commission (EEOC) (the enforcement agency for title VII).

President Johnson's 1965 Executive Order No. 11246 first referred to the concept by requiring federal agencies to take "additional affirmative steps" and "positive measures" to eliminate discrimination in federal employment.

President Nixon was the first to implement the concept of affirmative action in what became to be know as the Philadelphia Plan, which required the setting of racial quotas in the hiring practices of employers holding federal contracts.

Supreme Court later would reject the use of quotas in affirmative action.

Proponents of Affirmative Action came to the position from two opposing view points.

1. Those who thought that the Constitution required racial neutrality but saw affirmative action as a bridge to a truly "color blind" society.
2. The Fourteenth Amendment was designed to protect groups of discrete and insular minorities and affirmative action is the vehicle to protect those rights.

Affirmative Action Case Law

Admissions

Defunis v. Odegard, 416 U.S. 312 (1974).

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Cases established that the Fourteenth Amendment protects individual rights not group rights. When race is used as a criteria strict scrutiny is required. Under strict scrutiny the state must show a compelling state interest before it will be allowed to use race, a suspect category. To meet a compelling state interest a state must hold an administrative, legislative, or judicial hearing, reaching a finding of the existence of past discrimination, and developing a narrowly tailored remedy to right the wrong without harming others. Finally, race can be a factor as long it is not the sole factor in the admission decision.

Other Affirmative action cases

Cases Affirming Strict Scrutiny

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

Case which applies a lesser standard to Federal Government under the 5th Amendment

Metro Broadcasting, Inc., 497 U.S. 547 (1990).

(intermediate scrutiny latter rejected by the Court as error)

Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995).

The case reaffirms the use of strict scrutiny in cases involving race creed or national origin regardless of whether they are brought under the Fifth or Fourteenth Amendments. The case bases its decision in part on *Bakke.*

A United States Circuit Court of Appeals strikes down *Bakke.*

Hopwood v. Texas, 78 F. 3d 932 (5th Cir. 1996), *cert. denied,* 518 U.S. 1933 (1996) cert. was denied because Texas had changed the law so the court considered the controversy moot.

The case to watch

Grutter et al. v. Bollinger, No. 9775231 (E.D. Mich. Filed October 14, 1997) and No. 975928 (E.D. Mich. Filed Dec. 3, 1997), case consolidated and motion of interveners denied 188 F.3d 394 (6th Cir. 1999).

University of Michigan relied on a publication entitled *The Shape of the River*(1998) to build its defense for using race as a criteria in admission.

Conclusions for Higher Education institutions in admissions.

1. Institutions have not been following the compelling state interest test as outlined in Bakke.
    a. Hold an administrative hearing.
    b. Substantiate the existence of past discrimination.
    c. Develop a remedy with a nexus to the wrong and narrowly tailored to right the wrong while have little harm on other.

2. Redefine merit so admissions is not just based on GPA and standardized tests by expanding the data points used to make the admissions decision.

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Vouchers: Is Public Aid to Private Religious Schools Appropriate Public Policy for the 21st Century ?

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CIVIC FRIENDSHIP AND DEMOCRATIC EDUCATION*

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Though under emphasized in political liberalism, what Rawls calls "civic friendship" is an important ideal for democratic education. Pursuant to regime stability, civic friendship enjoins citizens to maintain a public concern for each other's character, in the sense of wanting to ensure the existence of a certain degree of depth underlying citizens' acceptance of the political terms of cooperation. U.S. public schools should embrace civic friendship more forthrightly than they have. However, in the U.S., civic friendship as an educational imperative is severely constrained by the First Amendment's Establishment Clause. Accordingly, this paper explores political liberalism's commitment to civic friendship and how it might be pursued in public schools within the parameters set by nonestablishment. It concludes by advancing two policy proposals consistent with both the imperative and the constraint: a "school stamps" plan first proposed in the 1970s and a modified version of a "clergy in the schools" program recently struck down by a federal circuit court.

Democracy requires deeper moral roots for itself than it alone can provide. The political liberalism of John Rawls recognizes this and takes it as a central problem. On my reading, there exists within Rawlsian political liberalism an urgent yet under emphasized imperative to shore up the "reasonable" comprehensively grounded moral anchorings that keep secure the political terms of cooperation that constitutional democracy needs in order to function. As George Washington emphasizes in his *Farewell Address*, "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . .Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."[1] Along with the cultivation of citizenship proper, this Washingtonian civic education concern with citizens' comprehensive groundings must therefore be recognized as a legitimate and even core aim of democratic education, one presenting a particular challenge to polities as heterodox as the U.S. and others. Analogous to capitalism's need for extra-capitalistic virtues like loyalty and trust,[2] democracy requires extra-democratic virtues associated with the commitment to *some* reasonable comprehensive account of the good, secular or religious. For without the deeper groundings (and I emphasize "grounding*s*," in the plural), the political cooperation is placed at unacceptable risk.

A compelling way of framing this concern is in terms of what Rawls calls "civic friendship," an idea with a long pedigree in democratic thought, extending, at least, to the semi-antagonistic Platonic and Aristotelian conceptions.[3] Based on mutual respect and also a concern for democracy's stability, Rawlsian civic friendship enjoins us to have a certain kind of concern for one another's character, though not in the manner of the busybody who wants to scrutinize everyone's private lives. Civic friendship represents a public way of relating to one another *as citizens*, where we are not only civil in our discourse but we work positively to overcome mutual suspicion and hostility by bothering to try to understand something of our own and our fellow citizens' deepest moral motivations. I will argue that, although rightly constrained constitutionally by the Establishment Clause, the public school system can and should do a great deal more for civic friendship than it now does.

* * *

By way of clarification, I will consider two concrete recommendations. One is a policy proposal that would help make public schools more porous vis-à-vis community groups with comprehensive orientations, while also maintaining nonestablishment and an appropriate level of oversight. The other is drawn from a recent federal circuit court case outlawing a certain kind of collaboration between a public school district and religious educators. I'll argue that the outlawed practice could be easily modified to pass constitutional muster and that the resulting modified program would be consistent with nonestablishment and conducive to civic friendship.

First, the policy proposal resurrects an idea first proposed in the 1970s by longtime school voucher advocate and legal scholar Stephen Sugarman, what he calls a "school stamps plan," in essence, a voucher plan for *extracurricular* activities that leaves in tact the compulsory part of the curriculum.[4] With a school stamps plan, families would be issued school stamps redeemable for educational services of many different kinds, particularly those most commonly found outside the regular school program. The possibilities for which the stamps could be used would be limited only by the resources of the community and the suitability of the providers (which could be certified in various ways—Sugarman suggests, for example, that providers post a modest bond and file an affidavit with the local educational authority). Also, for feasibility and equity reasons, distribution of the stamps might be means-tested. Building on Sugarman's idea, school stamps might be used for foreign language instruction, supplementary science courses, tutoring of all kinds, athletics, piano lessons, scouting, acquiring educational material such as books and computer equipment, certain types of before and after-school programs for the youngest children, and also, pending the resolution of potential Establishment Clause difficulties, certain types of secular and/or religious moral education.[5] (While the constitutionality of whole-school voucher programs still hangs in the balance,[6] a school stamps plan limited to extracurriculars would be rife with relevant dissimilarities. For example, such plans would be outside the ambit of state compulsory education laws (a factor typically augmenting nonestablishment protections) and, so long as the criteria for approval and oversight of potential providers were religion-neutral,[7] school stamps would constitute "indirect" rather than "direct" aid to provider organizations in that individuals are doing the provider-choosing (as in the case of college student loans). Perhaps most significantly, school stamps would provide an impressive array of secular benefits not easily achievable in other ways. I would also add that such a program would be a natural site for the public service, or "service learning," proposals popular among many communitarians.[8] Sugarman elaborates some additional details:

> Many persons and groups could qualify as providers of goods and services for which the coupons could be used. The public schools themselves could offer after-school, evening, and weekend programs; but a pupil would not be restricted to the offerings of his own regular school. Other public institutions such as libraries and parks and recreation departments could also become providers. The state or district might even set up warehouses for the purpose of renting educational materials—telescopes, pocket calculators, and the like. Finally, private parties could offer programs in return for the coupons: dancing schools, photographic studios, financial institutions that could train in money management, reading clubs, and so on, as well as individual or small-group tutors of nearly every imaginable subject. Public schools have another role here: to lease space as their facilities for other offers to use. The school stamps plan could operate in the summer as well as during the school year. . .[9]

Administering a school stamps program would involve substantial resources, not only to fund the stamps themselves, but also to sort out the many logistical, clerical, governance and liability complexities that would ensue. But it would be a worthy challenge.

From the perspective of political liberalism and its civic friendship imperative, a well-run school stamps program would stand to offer a great deal. First and foremost, it would provide greater opportunities for helping children to discover and elaborate their own moral depths, particularly insofar as they were rendered more likely come into contact with individuals, informal groups, and organizations who are actually expressing *and tangibly enacting* their various comprehensive commitments. Perhaps they might come to understand what really motivates some citizens to care for the planet, beyond just putting out the recycling every week. They might be more likely to see first-hand how strong religiously and/or secularly-based moral views sustain many citizens in physically and emotionally demanding charitable work, such as Meals on Wheels, the foster care of disabled infants, organizing the town's annual parade, becoming a Big Brother or Sister, working in a soup kitchen. Maybe school stamps will maximize their chances of experiencing directly how lively certain activities can become when animated by the deep and specific convictions rarely on display within public school walls: by participating in a church choir, working with those planning a Wiccan summer solstice festival, researching their own and others' genealogy and family history, interpreting their dreams with Freudians or Jungians, studying anti-Semitism and a trip to the Holocaust Museum in Washington D.C., learning an Asian martial art and its enveloping moral and spiritual code. This kind of thing would, I think, be very far from "cafeteria"-style multiculturalism and other superficial attempts at "celebrating" diversity currently afflicting many public schools. It would enable a much more authentic encounter with diversity of all kinds (including the moral and religious kinds of diversity systematically ignored by public schools) in an environment where those involved are infinitely freer than public school teachers to discuss and exhibit their motive comprehensive underpinnings. Young citizens would thereby be less cripplingly sheltered than they are now from people with strong, passionate commitments. For this exposure seems a sine qua non of civic friendship, where one develops an ability to perceive and, where appropriate, appreciate what lies beneath and behind the politics of those who agree and, most importantly, those who do not. Political liberalism aspires to forge a citizenry depthful enough to do this.

This leads to my second example. It involves a recent case from the U.S. Fifth Circuit Court of Appeals, *Doe v. Beaumont Independent School District* (1999), striking down a school counseling program utilizing clergy as volunteers.[10] Beaumont Independent School District (BISD), a medium-sized district in Texas, initiated in 1996 a "Clergy in the Schools" (CIS) program, where individual members of the local clergy were invited into the school to provide volunteer group counseling sessions to students at the school during school hours. CIS is part of a broader "School Volunteer Program" where BISD works with a range of community volunteer groups in order to take advantage of various types of expertise in the community so as to enhance students' education. CIS is open only to clergy, paralleling the composition of the other volunteer programs, which were also limited to individuals of the desired type (other programs utilized local attorneys, senior citizens, business persons). "The Program's stated goals are to provide (1) meaningful dialogue between the clergy and the students regarding civic virtues and morality; (2) a safe school atmosphere; and (3) volunteer opportunities for an additional group of stakeholders in the public schools."[11] School administrators and the clergy volunteers meet to discuss central aspects of the program, including relevant First Amendment constraints on the counseling sessions (e.g., no praying with students, etc.), as the clergy members plan one or two visits to the schools annually (elementary schools are to be visited once, secondary schools twice). The majority of the clergy volunteers were Protestants, but there were others, including a rabbi. (The school explains this disproportion as reflecting the pattern of religious affiliation among the local population.) When they arrive on campus, school personnel escort the clergy volunteers inside, whereupon school officials (administrators and counselors) then select students for participation

> with an eye toward assembling a group diverse in ethnicity, academic ability, and school deportment. BISD officials then remove the selected students from class and assemble then in another schoolroom to participate in the group counseling, without parental notification or consent. . .students who are selected have the option of declining to participate. Each counseling session is attended by the school's principal and counselor. Under the Program's guidelines, the sessions are designed to comprise approximately thirty-five students and ten to twelve volunteer clergymen; the guidelines proscribe one-on-one meetings. . .[12]

The District had distributed a "Fact Sheet" further explicating the aims of CIS. These are detailed in Judge Emilio Garza's dissenting opinion:

> The Program sought to provide "a positive forum which contributes to open dialogue of students discussing concerns and problems of the 21st century," to create a meaningful dialogue between clergy and students, to make schools safer, and to give the clergy a volunteering opportunity. It included the following set of expectations for volunteers: be a positive role model for students; show concern for students' success; provide academic support for students; be aware of what is happening in the schools; provide a safe and secure atmosphere for students; provide a positive means for obtaining desired student behavior; and help students gain and understanding of the real world. It listed alcohol, peer pressure, racial issues, self-discipline, self-esteem, setting goals, stereotyping, respect, the reasons for rules, unity, and violence as possible discussion topics suggested by students.[13]

The District also stressed in the "Fact Sheet" that CIS did not concern religious issues and, in fact, explicitly prohibited discussion of them in the counseling sessions. It emphasized that clergy in particular were chosen, in the words of the "Fact Sheet," "to provide opportunities for students to dialogue with skilled resources in the community. Because the clergy has the natural skills of listening and communicating, BISD chose to tap this resource which has been previously not used to its fullest."[14]

The Doe parents filed for a temporary restraining order to halt the program on behalf of their minor children. This was denied, as was another motion to halt the program. The federal district court then granted a summary judgment in favor of BISD. Yet on appeal to the three-judge U. S. Fifth Circuit Court of Appeals, the Does won a reversal of the district court's ruling against them. The Fifth Circuit Court struck down the CIS program as an Establishment Clause violation, therefore "invalidating the Program and prohibiting its further implementation."[15]

After deciding the Does had standing to sue (none of the Doe children actually took part on the counseling sessions, though they were present in classrooms from which participant-students were drawn), the two-judge majority reasoned through the three main Establishment Clause violation tests and ruled that the CIS program flunked them all. First is the tripartite *Lemon* test. The first prong of *Lemon* requires that the policy in question have a clear secular purpose that neither "advances nor inhibits religion." *Lemon*'s second prong requires that the challenged state action have a "primary purpose that neither advances nor inhibits religion." Finally, *Lemon* also prohibits the "excessive entanglement" of church and state officials in planning, administering, evaluating, etc. the activity.[16] The majority opinion finds that the secular purpose of the CIS, the main elements of which are stated above by BISD, is "merely pretextual," largely because of a public statement made by BISD Superintendent Carroll Thomas favoring prayer in the schools and also the fact that the CIS is an "exclusive counseling arrangement afforded to the clergy."[17] Because the *Lemon* test is disjunctive, this flunking of one prong would be enough to rule CIS an Establishment Clause violation. Yet the Court continued. Turning to the second part of *Lemon*, the majority points out that not only is aid to a particular religion prohibited, but also the favoring of religion over non-religion.[18] Here the main problem also involves the exclusivity of the arrangement. Why did BISD think that only clergy were suitable for counseling on matters of civic virtue and morality? BISD, for example, failed to include lay professionals who might be equally qualified. "BISD does not select its volunteer counselors based on neutral criteria—such as listening or communication skills---but on the very fact that they are *religious* representatives."[19] In this way, BISD exhibits preference for religion over non-religion, which violates *Lemon*'s second prong. CIS also fails the third "excessive entanglement" prong, owing to the extent of planning and oversight exercised over the program by its created ensemble of religious and government officials: the selection of clergy volunteers, the preliminary planning and "training sessions," program monitoring, the fact that school administrators and counselors attended and facilitated the sessions, etc.

Secondly, the *Doe* majority also argues that CIS violates the coercion test laid out in *Lee v. Weisman* (1992) (school-sponsored prayers at graduation create "subtle coercive pressures" toward participation and so violate the Establishment Clause), which prohibits government direction of a religious exercise where objectors are obliged to participate, even if the participation is formally noncompulsory and the obligation is generated merely by psychological or "peer" pressure. Following *Lee*, the *Doe* majority argues that the student who is pulled from the classroom but "does not wish to participate is placed in the untenable position of having to choose either to attend a session he truly wants to avoid or to decline the "invitation" and thereby risk actual or perceived opprobrium and ostracism from BISD administrators and faculty, not to mention from his peers. This affords the student no real choice, just a "Hobson's Choice"—either to participate in the Program against his wishes or decline at the risk of becoming a pariah."[20] *Lee* establishes that such a "choice" does not count as voluntary. As for the question of whether the counseling sessions were religious exercises, the premise from which the coercion worry proceeds, the majority again relies on the exclusivity of the selection of clergy as volunteers, which causes "the exercise to lose its secular character entirely," though "in a vacuum student counseling is not an inherently religious undertaking. . ."[21]

Thirdly and finally, the "endorsement test" seeks to determine whether government is endorsing religion by means of the action in question. Here, the government should never favor religion over nonreligion such that a reasonable observer might conclude that the government is taking a position on the matter, "or makes adherence to a religion relevant in any way to a person's standing in the political community."[22] "The government creates this appearance when it conveys a message that religion is "favored," "preferred," or "promoted" over other beliefs."[23] Yet again because of the selection and utilization of clergy to the exclusion of other qualified persons in the community capable of engaging in dialogue about morality with students, BISD officially "conveys the unmistakable message that religion is favored, preferred, and even promoted over other beliefs. . .Theirs is a message of endorsement that cannot possibly be lost on the young, impressionable, easily influenced schoolchildren whom the law entrusts to these very officials, *in loco parentis*, for the entire school day."[24]

From the perspective of the Establishment Clause, then, the Doe majority holds CIS in violation by every available standard. Yet Judge Garza's spirited dissenting opinion disputes the majority opinion point by point. In his view, BISD exhibited an "unwavering commitment to a secular focus" sufficient to establish (not withstanding the stray comments of the Superintendent about prayer in schools) their sincerity. He also questions how CIS, in the context of the other volunteer programs that also have a particular focus (and so limit the selection of volunteers accordingly), could really be providing a benefit to religion when, in a situation such as this, it seems more accurate to say that the clergy-volunteers are the ones actually *providing* benefits to the students, not the other way around, and so any benefit the clergy-volunteers end up receiving is "no more than indirect or incidental."[25] More significantly, Garza questions the majority's argument that the exclusivity of BISD's exclusive reliance upon clergy for the counseling sessions is analogous to Bible-reading, prayer, or some other religious ceremony. Garza writes:

> Beneath this perception lies the assumption that the clergy are incapable of expounding on civic values from anything but a religious perspective.
>
> I reject the majority's position. That civic values bear a close relationship to certain religious beliefs proves neither that CIS lacks a secular purpose nor that its primary effect is the advancement of religion. BISD may advocate civic values that "merely happen to coincide or harmonize with the tenets of some or all religions."[26]

For Garza, the exclusivity of the reliance upon clergy does not render CIS unconstitutional because the clergy are not here conducting anything resembling a religious observance and are, in fact, explicitly prohibited from doing so by BISD. Absent any performance of anything resembling distinctly religious duties, their mere *identity* as clergy should not prohibit a public school from inviting them to volunteer. Such a prohibition would risk a non-neutral discriminatory stance toward religion, a priori singling it out and excluding it from involvement in a government program in which groups of every other kind are eligible to participate. This would begin to look like a violation of Free Exercise. To underscore the point, Garza quotes approvingly from none other than Justice William Brennan, who writes, "The

Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[27]

However, Garza then proceeds to diminish the rhetorical force of his dissent with the intemperate accusation that the *Doe* majority would have to rule against a school speaker such as the Reverend Martin Luther King, Jr. or Archbishop Desmond Tutu.[28] That he would level this charge shows that Garza, despite his salutary caveats expressed above, does not recognize the full subtlety of the main issue. The majority rightly dismisses his mischievous inference, for, as indicated above, the salient issue is not the mere fact of the volunteers' religious identity, but the exclusivity of the selection of them according to that constitutionally singular identity. They respond by reinforcing just this point:

> BISD cannot design and implement a volunteer counseling program consisting *solely* of clergy members. The opinion in no way affects BISD's ability to create a broad-based program that truly integrates the clergy with nonreligious community representatives and certainly does not mandate that BISD discriminate against the clergy or bar a high-profile public figure from advising the student body simply because such [a] figure happens to be a cleric. Civil rights leaders like King and Tutu speaking as civil rights leaders do not lose their eligibility to speak publicly by virtue of their ordination.[29]

This clarification provides rather obvious instructions for how BISD or anyone else might revise such a program consistent with nonestablishment. As we have seen, CIS fails the Establishment Clause tests largely because of the element of exclusivity inherent in BISD's somewhat blind preference for mainstream, "respectable" religion as a teacher of civic virtues, morality, and the like.

If, however, following the majority's suggestion above, BISD had designed the program such that it was at least potentially inclusive of secular persons[30] with the relevant expertise or, to use the terminology of political liberalism, if it had constructed the program as an occasion whereby those adhering to CCG's, *secular or religious*, might participate, then such a program would plainly be in much better constitutional shape. The "religiousness" of the program thereby decreased, the other Establishment Clause concerns, such as coercion and endorsement, would proportionately decrease as well.

Such a reconstruction of the program would not only be more consistent with nonestablishment, it would also be more conducive to educating students toward civic friendship. For civic friendship requires citizens to be disposed and able to recognize and appreciate (in the sense at least of trying to understand) the CCG's underlying each of their fellow citizens' adherence to the overlapping democratic political consensus. So civic education is shortchanged when citizens are limited in the range of their fellow citizens' CCG's to which they are exposed. Civic friendship pedagogues would likely face tough pedagogical choices here, quasi-utilitarian dilemmas such as whether it would be better to know, say, three or four other comprehensive doctrines in depth or a dozen of them superficially. This would be an appropriate arena for the exercise of pedagogical expertise. In any event, it is the kind of problem with which educators *should* be wrestling: surely, even in a place like Beaumont, Texas, there is bound to be a wider range of comprehensive doctrines upon which to draw than simply those represented by the town's mainstream religions. It is likely that the real reason not to reach beyond the mainstream—and for a school district like BISD to equate virtue and morality with religion—resides in the moral parochialism and consequent lack of ability for civic friendship found in many of the local government officials themselves, along with a large dose of prudent timidity regarding the preservation of school-community relations. As has been the case historically, school administrators are not typically known for their brazenness over and against their local communities.[31] This is largely because "we the people" have wanted it this way: the U.S.'s staunch commitment, relative to other democracies, to local control of schools has in this respect reaped exactly what it's sown. Far from being a matter of fuzzy "niceness" or etiquette, then, civic friendship will often present something of a challenge to school administrators and local school boards, sometimes compelling them to confront elements of their local communities just often as they "partner" with them. When fundamentalist parents complain about environmentalist volunteers, atheist parents about clergy, and the whole lot of them about who-knows-what, school officials should have something justifiable to say to them all. The teaching of civic friendship gives them a compelling *educational* reason to overcome curricular (and extra-curricular) narrowness by both affirming and challenging their constituencies' comprehensive views, the latter accomplished by the school's pedagogical attention to multiple CCG's. The democratic educator's commitment to civic friendship therefore always gestures beyond itself, toward to a wider world than is dreamt of in any single "philosophy."

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[*] For their helpful comments, thanks to Walter Feinberg, Kevin McDonough, and the other participants at "Collective Identities, and Cosmopolitan Values: Group Rights and Public Education in Liberal Democratic Societies," Montreal, Quebec, June 2000. The conference was funded by the Spencer Foundation and the Canadian Government.

[1] George Washington, "The Farewell Address, September 17, 1796," pp. 492-493, in *The People Shall Judge: Readings in the Formation of American Policy, Volume I*, selected and edited by the Staff, Social Sciences 1, The College of the University of Chicago (Chicago: University of Chicago Press, 1949), pp. 486-495.

[2] See Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: The Free Press, 1995)

[3] John Rawls, "The Idea of Public Reason Revisited," p. 594, in Samuel Freeman, ed., *John Rawls: Collected Papers* (Cambridge, MA: Harvard University Press, 1999), pp. 573-615. For some historical background, as well as an argument that civic friendship is inclusive of feminist concerns, see Sibyl A. Schwarzenbach, "On Civic Friendship," *Ethics* 107/1 (October 1996), p. 97. On the Greek conceptions, including a good overview of Plato and Aristotle (and later followers of both) on this point, see Horst Hutter, *Politics as Friendship: The Origins of Classical Notions of Politics in the Theory and Practice of Friendship* (Waterloo, Ontario: Wilfrid Laurier University Press, 1978), and also the relevant chapters in John Cooper, *Reason and Emotion: Essays on Ancient Moral Psychology and Ethical Theory* (Princeton: Princeton University Press, 1999).

[4] Stephen Sugarman, "Education Reform at the Margin: Two Ideals," *Phi Delta Kappan* (November 1977), pp. 155-156.

[5] Some of these examples are mentioned by Sugarman, some I am supplying myself.

[6] As of this writing, large-scale experiments in Wisconsin, Ohio and Florida have faced inconsistent fates, and for somewhat different reasons. Though it has denied cert. in a case involving the Wisconsin program (for the moment preserving a Milwaukee plan where public money goes to religious schools), the Supreme Court has yet to rule conclusively on the matter. It is not obvious what they will say.

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[7] This would be to embrace "neutrality theory" à la *Bowen*, supra, where there are criteria neutral among religious providers and neutral between religious and non-religious providers. These programs would also need to take steps to avoid any serious entanglement situations that might run afoul of *Lemon*.

[8] Foremost among these has been Amitai Etzioni, for example, in his *The Spirit of Community: The Reinvention of American Society* (New York: Touchstone Books, 1994). The Clinton Administration's Americorps program embodies some of these ideas. Service activities within the context of school stamps would also have the advantage of removing some of the more objectionable features of "forced" public service by making it voluntary. Public service in the context I'm recommending, however, is potentially more equitable than, say, a blanket high school graduation requirement, in the sense that the service requirements might not be as crucial for poorer kinds as wealthier ones. It probably makes a lot more sense for the rich kid to work in the soup kitchen, while the poor kid (who may be in the soup line!) gets ballet lessons he or she might otherwise not get. Both children benefit, but in different ways. One might even designate some of the components as "service learning experiences" and officially encourage students to take a certain proportion of those (though I would encourage the service experiences rather than require them, again, forced public spiritedness being a difficult pill to swallow).

[9] Sugarman, "Education Reform at the Margin," p. 156.

[10] *Doe v. Beaumont Independent School District*, 5th Circuit Court of Appeals, No. 97-40429 (1999).

[11] Ibid.

[12] Ibid.

[13] Ibid., Garza, J. dissenting, at 17.

[14] Ibid.

[15] Ibid.

[16] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[17] *Doe v. Beaumont Independent School District*, at 8.

[18] *Everson v. Board of Education of Education of Ewing*, 330 U.S. 1, 15-16 (1947).

[19] *Doe v. Beaumont Independent School District*, at 9.

[20] Ibid., at 10

[21] Ibid., at 11

[22] *Doe*, quoting *Ingebretson*, 88 F.3d at 280 (5th Cir. 1996).

[23] *Doe*, Id., quoting *Allegheny*, 492 U.S. 593 (1989).

[24] *Doe*, at 12

[25] *Doe*, Garza, J. dissent, at 24.

[26] Ibid., at 25, quoting *McGowan*, 366 U.S., at 442.

[27] Ibid., Garza, J. dissent, at 32-33, quoting from *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment).

[28] Ibid., Garza, J., dissent, at 25.

[29] Doe, at 14

[30] I say "potentially inclusive" rather than de facto inclusion because it would seem permissible if it made eligible and treated equally both religious and nonreligious volunteers, but through no omission, misdeed or bias on the part of BISD. It might happen that no non-religious volunteer would apply, or those who did might happen to be ineligible for some requisite non-religious reason, such as having a criminal record, insufficient experience working with children, or the like..

[31] See Raymond Callahan, *Education and the Cult of Efficiency* (Chicago: University of Chicago Press, 1962).

VOUCHERS: IS PUBLIC AID TO PRIVATE RELIGIOUS SCHOOLS APPROPRIATE PUBLIC POLICY FOR THE 21ST CENTURY?

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In recent years the problem of the constitutionality of school voucher programs that include sectarian schools has reemerged. Such inclusive voucher programs, thought to have been a dead school funding reform since 1973, have again become politically viable, and thus, as states have experimented, vouchers have returned to the courts.

I. Question of Constitutionality of Voucher Programs

A. Violation of the Religion Clause of the First Amendment to the United States Constitution.

1. The Supreme Court has held that public aid to private sectarian schools, regardless of the wording used by state legislators, violates the establishment clause of the First Amendment. In June of 1973 the United States Supreme Court decided two cases, the topics of which were tuition breaks for parents who sent their children to private schools.

a. *Committee for Public Education and Religious Liberty et al. v. Nyquist, Commissioner of Education of New York, et al*[1]. dealt with amendments to the New York Education and Tax Law which established three financial aid programs for nonpublic elementary and secondary schools.

(1) The Court acknowledged the state's compelling secular interest in preserving a healthy and safe educational environment for all of its school children; in promoting pluralism and diversity among its public and nonpublic schools; and in its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.[2]

(2) The Court went on to state that "the propriety of a legislatures purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State."[3].

(3) The Court unanimously agreed that under previous cases, state aid directly to sectarian school had been held clearly unconstitutional.[4]

(4) The controlling question before the Court in *Nyquist* was whether the fact that the aid was given to the parents rather than the school was significant enough to mandate a result different than that found in earlier cases. As the Court noted: "Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools... [T]he effect of the aid is unmistakably to provide desire financial support for nonpublic, sectarian institutions."[5]

(5) The Court stated that the presence or absence of coercion was irrelevant to questions arising under the Establishment Clause. "If the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. "*Whether the grant is labeled a reimbursement, a reward, to a subsidy; its substantive impact is still the same.*" [emphasis added][6]

(6) A final discussion held by the Court at the end of the opinion in *Nyquist* bode especially poorly for the idea of vouchers. That discussion dealt with the potentially divisive political effect of any type of aid program. Pointing to its decision in *Everson*, the Court emphasized that competition among religious sects for political and religious supremacy has occasioned considerable strife. In earlier cases the Court had addressed this issue specifically and come to the conclusion that the potential for political divisiveness related to religious belief and practice is aggravated by state programs, such as tuition reimbursement, grants for maintenance, and income tax relief, which call for continued and likely increasing annual state appropriations. "We know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies."[7]

b. *Sloan, Treasurer of Pennsylvania, et al. v. Lemon, et al.*[8], brought before the Court the issue of whether it was a violation of the Establishment Clause for the state of Pennsylvania to reimburse parents for tuition spent to send children to nonpublic schools.

(1) The Court took judicial notice of facts from the record below, specifically that 96% of the children attending nonpublic schools in Pennsylvania in 1969 attended church-related schools. The Court saw no constitutionally significant distinctions between the Pennsylvania law in question in *Sloan*, and the program which was declared unconstitutional in *Nyquist*"No matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions."[9]

(2) The Court held the Pennsylvania tuition grant scheme in violation of the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions.[10]

2. Advocates of voucher plans have pointed to wording in subsequent Supreme Court cases in an attempt to declare the holdings in *Nyquist* and *Sloan* dead. Legal scholars have cited *Mueller v. Allen*[11] as a case in which the Supreme Court had shown signs of dropping its reliance on the Lemon Test

a. *Mueller* was a case which dealt with the constitutionality of a Minnesota statute that allowed state taxpayers to deduct educational expenses from their state income tax.[12]

(1) In writing the opinion for the majority, Chief Justice Rehnquist stated that the Court had historically distinguished between those cases involving laws and statutes that are generally applicable, such as *Walz v. Tax Commission*[13], *Everson v. Board of Education*[14], and *Board of Education v. Allen*[15], and those laws and statutes that may seem similar, but that provide assistance that is not generally available to all citizens or specifically targeted

religious institutions to an unconstitutional degree, such as *Meek v. Pittenger*[16], *Wolman v. Walter*[17], and *Nyquist.*

(2) Rehnquist then stated that the Court's duty was to decide whether the Minnesota tax deduction was similar to the Court approved assistance statutes or similar to those laws which the Court had struck down.[18]

(3) In deciding which previous decision *Mueller* most resembled, the Court was not contemplating overturning either those cases that allowed certain types of indirect government aid to religious educational institutions, nor was it contemplating overturning those cases that prohibited certain types of governmental aid to religious educational institutions. The Court was simply pigeon-holing *Mueller* into its correct spot among existing case law.

(4) The importance of *Mueller* is that in it, the Supreme Court had the opportunity to overturn or even ignore the Lemon test, but instead chose to apply it to the case. The Court also had the opportunity to overturn *Nyquist,* either in part or in whole, and it did not. Therefore, both *Lemon* and *Nyquist* are still good law and any voucher scheme would run afoul of the Court's prohibition against "excessive entanglement" as described in *Lemon* and interpreted in *Nyquist.* Although both of these cases have been mentioned, and at other times even attacked, in later federal and Supreme Court cases, the simple fact is that they are both still good law. Neither case has been overturned by the Supreme Court. Rather, they have been distinguished and, thus, left in full force.On June 10, 1998 the State Supreme Court of Wisconsin ruled that the school voucher program in use in Milwaukee did not violate the Establishment Clause of the First Amendment of the United States Constitution, despite the fact that sectarian schools participated in the program. The Wisconsin high court also ruled that the Milwaukee voucher program did not violate the religious establishment provisions of the Wisconsin Constitution, the private or local bill prohibitions of the Wisconsin Constitution, the uniformity provision of the Wisconsin Constitution, or Wisconsin's public purpose doctrine. While these last four parts of the Wisconsin high court's ruling are

worthy of examination, it is the first ruling of the Wisconsin Court that was denied Supreme Court review and this is the ruling that will be examined here.

B. State Attempts at School Voucher Programs

   1. The Milwaukee Parental Choice Program

   2. Cleveland Voucher Program

   3. Florida Voucher Program

   4. Maine Voucher Program

   5. Vermont Voucher Program

C. Much to the dismay of the proponents of "educational choice" plans who hope to see the government fund religious schools either directly or indirectly, until the United States Supreme Court chooses to overturn *Nyquist* and *Sloan*, any voucher plan which does not specifically earmark funds for a specific secular purposed and is not generally applicable to all children will fail the second prong of the Lemon Test.

II. Policy Considerations

A. Voucher programs actually inhibit the free exercise of religion

   1. "Opt out" provision in the Milwaukee Parental Choice Program.

      a. A piece of legislation need not be overtly hostile to religion to inhibit it. The rational behind the seventh amendment to the MPCP was to provide participating program students a means of "opting out" of religious activities if they choose to attend a religious school. This "opt out" provision of the amended MPCP constitutes an inhibiting of religion. All religious schools have a religious mission as well as an academic one. For the government to require religious schools, as a part of the regulations for participating in a state program, to let students from this program "opt out" of any personally objectionable religious activities, restricts the ability of the school to accomplish its religious mission, and thus, inhibits religion.

B. Dangers arising from religious educational institutions becoming excessively entangled with government.

1. In *Nyquist* the Supreme Court pointed out the dangers of legislation that had the potential of causing religious institutions to become dependent upon state funding and the politicization of religion that might result. The Court also pointed out the dangers of religious institutions becoming involved with the monetary side of the legislative process. These dangers, the Court stated, were enough to constitute an excessive entanglement and, thus a violation of the Establishment Clause.

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[1] Committee for Public Education and Religious Liberty *et al. v.* Nyquist, Comm. of Educ. of New York, *et al.*, 413 U.S. 756 (1973).

[2] *Id.* at 756, 773.

[3] *Id.* at 774.

[4] "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever the form they may adopt to teach or practice religion." Everson v Board of Education, 330 U.S. 1, at 16 (1947).

[5] 413 U.S. at 783.

[6] *Id.* at 786.

[7] *Id.* at 797. Historically, the self-perpetuating tendencies of any form of government aid to religion has been a concern to the Court in it Establishment Clause cases. 413 U.S. at 797, Ftnt. 56.

[8] Sloan, Treasurer of Pennsylvania, et al. v. Lemon, et al., 413 U.S. 825 (1973).

[9] *Id.* at 832.

[10] See also Walz v. Tax Commissioner, 397 U.S. 664, 668 (1970). The appellants attempted to argue that, because the law had been carefully drafted so as to avoid excessive entanglement, *Nyquist*, should be distinguished and not apply. The Court reminded the appellants, however, that since neither the New York law in *Nyquist*, not the Pennsylvania law in the instant case, withstood the second prong of the Lemon Test, the third prong, that being excessive entanglement, was not addressed by either case.

[11] Mueller v. Allen, 463 U.S. 388 (1983).

[12] In 1982 the Minnesota legislature passed a statute that allowed a taxpayer to deduct from his or her computation of gross income: tuition, textbook, and transportation expenses that the taxpayer had paid to another party. The deduction could not exceed $500 for K through 6, and $700 for 7 through 12. This applied to students attending schools in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, so long as the school was not operated for profit and complied with chapter 363 and the Civil Rights Act of 1964 (This would bar segregationist schools or schools that barred interracial dating on religious grounds). The statute defined textbooks to mean only instructional materials for secular classes, no those used to teach religious tenets, doctrines or worship. The statute also defined transportation to mean only transportation to and from the school, not transportation to and from extracurricular activities.

[13] Walz v.Tax Commission, 397 U.S. 664 (1970). This was a case in which a taxpayer challenged the property tax exempt status of religious enterprises, stating that this amounted to indirect contributions to religious institutions and was therefore unconstitutional. The Court ruled such tax exemptions were neutral as they lessened the interact between religion and the state and; that as all nonprofit institutions benefited from this exemption, not just religious ones, the law was not singularly targeted toward religion.

[14] Everson v. Bd. of Educ., 330 U.S. 1 (1947). The Court ruled constitutional the reimbursement of funds spent by parents to transport their children to and from both religious and non-religious nonprofit educational institutions.

[15] Board of Educ. v. Allen, 393 U.S. 236 (1968). The Court ruled that a state may loan secular textbooks to any child within that state.

[16] Meek v. Pittinger, 421 U.S. 229 (1983). The Court ruled a Pennsylvania law authorizing the provision of personal or instructional materials that could be used for religious, as well as secular, education to be unconstitutional.

[17] Wolman v. Walter, 433 U.S. 229 (1977). In *Wolman*, the Court ruled that a state may not provide nonpublic schools (as opposed to individual students) with instructional materials or provide nonpublic schools with transportation and services for field trips.

[18] *Mueller*, *supra* note 31 at 3066.

Vouchers:

Is Public Aid to Private Religious Schools Appropriate Public Policy for the 21st Century

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Christian School Curricula and Public Funding of Sectarian Schools

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I. Introduction

A. Conservative Religio-Political Criticism of Public School Curricula

1. Christian Right literature

Christian Right leaders such as Phylis Schlafly (Eagle Forum), James Dobson (Focus on the Family), Mel and Norma Gabler (Educational Research Analysts), Robert Simonds (Citizens for Excellence in Education), Pat Robertson, and Jerry Falwell have been and continue to be highly critical of public school curricula.

2. Scholarly discussion

Their attitudes toward public education have been examined by a number of scholars. Overwhelmingly, these scholars describe Christian Right commentators, and activists as overtly hostile toward public education and, especially, toward public school curricula.[1]

3. Implications

Examining fundamentalist Christian schools allows us to answer the question of what type of schooling and especially what kind of curricula, religio-political conservatives would see an appropriate replacement for public education. Few scholars or commentators have examined conservative evangelical/fundamentalist schools[2] and fewer yet have tied the question of public funding for sectarian schools to the content of Christian education.[3]

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[1] DAVID BERLINER & BRUCE J. BIDDLE, THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACKS ON AMERICA'S PUBLIC SCHOOLS (1995); JOAN DELFATTORE, WHAT JOHNNY SHOULDN'T READ: TEXTBOOK CENSORSHIP IN AMERICA (1992); FRITZ DETWILER, STANDING ON THE PREMISES OF GOD: THE CHRISTIAN RIGHT'S FIGHT TO REFINE AMERICA'S PUBLIC SCHOOLS (1999); BARBARA GADDY, T. WILLIAM HALL, & ROBERT J. MARZANO, SCHOOL WARS: RESOLVING OUR CONFLICTS OVER RELIGION AND VALUES (1996); FRANCES R. A. PATERSON, CENSORING SATAN: THE RELIGIOUS RIGHT AND CHALLENGES TO PUBLIC SCHOOL MATERIALS AND INSTRUCTIONAL ACTIVITIES (forthcoming 2001); EUGENE F. PROVENZO, JR., RELIGIOUS FUNDAMENTALISM AND AMERICAN EDUCATION: THE BATTLE FOR THE PUBLIC SCHOOLS (1990); Louise Adler, *Institutional Responses: Public School Curriculum and Religious Conservatives in California*, 28 EDUCATION AND URBAN SOCIETY 327-346 (1996); Martha McCarthy, *Challenges to Public School Curriculum*, 75 PHI DELTA KAPPAN 55-60 (1993).

[2] PAUL F. PARSONS, INSIDE AMERICA'S CHRISTIAN SCHOOLS (1987); SUSAN D. ROSE, KEEPING THEM OUT OF THE HANDS OF SATAN: EVANGELICAL SCHOOLING IN AMERICA (1988); ALAN PESHKIN, GOD'S CHOICE: THE TOTAL WORLD OF A FUNDAMENTALIST CHRISTIAN SCHOOL (1986); Dan B. Fleming & Thomas C. Hunt, *The*

B. Methodology/Scope of analysis

Using qualitative methods based on the work of Glesne and Peshkin and Hodder, I examined 23 social studies and English textbooks distributed by A Beka Books and Bob Jones University Press and 84 self-instruction booklets produced by School of Tomorrow.[4] Of these, 9 books and 36 self-instruction booklets were read in their entirety (approximately a quarter of million individual lines of text). Although the vast majority of their textual material could not be considered objectionable, these instructional materials differ from secular textbooks in significant ways. The differences are profound and have serious educational and cultural implications.

C. Overarching characteristics of Christian school textbooks

1. Integration of religious and nonreligious material.
2. Juxtaposition of persuasive and factual material.
3. Explicitly didactic passages in both elementary and secondary textbooks.
4. Absence of gender inclusive language.
5. Frequent use of identifying descriptors for people, groups, and movements, often implying that some are acceptable and some are not.
6. Inclusion and exclusion or noticeably disparate amounts of coverage of individuals and groups with favorable treatment of some and neutral or explicitly negative treatment for others.
7. Denigration of religious faiths inconsistent with conservative evangelical Christianity.
8. Pervasive repetition of and clear approval of conservative political positions and political leaders combined with explicit and implicit disapproval of liberal positions and political leaders combined with an uncritical stance toward capitalism, a distinct preference for free market solutions to social problems, and a highly critical attitude toward government, especially the federal government

II Negative portrayal of religions outside the conservative Evangelical Protestant tradition

A. Anti-Catholicism

World as Seen by Students in Acclerated Christian Education Schools, 66 PHI DELTA KAPPAN 518-23 (1987).

[3] ALBERT J. MENENDEZ, VISIONS OF REALITY: WHAT FUNDAMENTALIST SCHOOLS TEACH (1993); Frances R. A. Paterson, *Building a Conservative Base: Teaching History and Civics in Voucher-Supported Schools*, 80 PHI DELTA KAPPAN (forthcoming Oct. 2000); Frances R. A. Paterson, *"Supreme Court: Enemy of Freedom?" Constitutional Law in Christian School Textbooks*, 29 JOURNAL OF LAW AND EDUCATION (forthcoming Oct. 2000); Frances R. A. Paterson, *Teaching Intolerance: Anti-Catholic Bias in Voucher-Supported Schools*, 64 EDUCATIONAL FORUM 139-149 (2000); Frances R.A. Paterson, "From Cannibals to Christians": Teaching about Non-Western Religions in Voucher-Supported Schools (1999) (unpublished manuscript, on file with the author).

[4] Corrine Glesne & Alan Peshkin, BECOMING QUALITATIVE RESEARCHERS: AN INTRODUCTION (1992); Ian Hodder, *The Interpretation of Documents and Material Culture, in* HANDBOOK OF QUALITATIVE RESEARCH (Norman K. Denzin & Yvonna S. Lincoln, 1994).

1. Explicit

The textbooks use language that describes Roman Catholicism as opposed to the true faith, i.e. "Bible believing Christianity," by describing Catholicism as "false" religion or a "distortion" or a "perversion" of true Christianity.

2. Implicit

The authors avoid using the terms "Roman Catholic" or "Catholic" when describing factual historical events and/or background in favor of the term "Christendom." They frequently include gratuitously detailed accounts of the martyrdom of dissenters and early Protestants and omit virtually any references to Catholic martyrs, especially the martyrdom of Catholics at the hands of Protestants. Renown Catholic figures, such as Thomas Aquinas, Joan of Arc, Becket, and Pope John Paul II, are given little coverage, their influence is omitted or given very little discussion, and/or their Catholicism is not mentioned or de-emphasized. The efforts of Protestant missionaries are discussed extensively and praised in glowing terms. Those of Catholic missionaries are omitted, de-emphasized, ridiculed, or attributed to venial motives.

B. Non-Western religions

The textbooks apply such terms as "false," "heathen," and "pagan" to the religions of Africa and Asia and those of the indigenous peoples of Australia and North American. For example, Islamic prayers are described as "worthless words spoken to a false god."[5] Occasionally, the existence or strength of non-Western religions is attributed to Satan. Believers in these religions are considered to be "bound in sin" because of their religious beliefs. In several instances, sarcasm and ridicule are employed when these faiths are discussed. Lack of material progress and oppressive governments are ascribed to belief in "pagan" religions. Hinduism is veiwed as making its adherents less truthful. Taoism "contradicts God's commandment to subdue the earth (Genesis 1:28) and to evangelize the world (Matthew 28:19-20)."[6] Native American religions prevented the "development of the land" and in some instances prevented Native Americans from having desirable family values, i.e. that the "husband is head of the wife."[7] Tension between these religious traditions and Christianity is emphasized and the desirability of conversion is stressed.

III Political bias

A. Generally

Over all, issues are not presented in even-handed fashion, i.e., with the strongest points of each side presented. The term "liberal" is almost invariably used in conjunction with negative statements while conservative groups, leaders, and policy positions are praised. The textbooks uniformly condemn abortion in the strongest terms. Discussion of the civil rights movement is relatively objective but somewhat cool in tone. A Beka's tenth grade American history text treats slavery as an example of

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[5] WORLD STUDIES FOR CHRISTIAN SCHOOLS 217, 218 (teacher's ed. 1993).

[6] *Id.* at 88

[7] SOCIAL STUDIES 1050, 26 (1984). Published by School of Tomorrow. *See* <http://www.schooloftomorrow.com>.

God's providence because it taught African-Americans the "patience to wait on the Lord."[8] "God prepared the slaves for their coming physical freedom" by first giving them "spiritual freedom," i.e., "freedom from the bondage of sin."[9] The authors subtly imply that Martin Luther King was, to some extent, responsible for the conditions that encouraged James Earl Ray to kill him.[10] Unemployment and both historical and contemporary poverty are treated from the perspective of providentialism or as a manifestation of individual weakness or failure. The textbooks consistently show a preference for market-based solutions. There is considerable criticism of the federal government and a noticeable preference for states' rights. The federal judiciary is criticized with what is, at times, intemperate language. In the realm of foreign affairs, the textbooks devote much space to highly negative coverage of Communism and socialism. The United Nations is also treated with hostility and a disdain that arises from explicitly expressed attitudes of fatalism and determinism regarding human efforts to affect international problems.

B. Constitutional law

Both the selection and treatment of cases appears to be made to reinforce a conservative ideological viewpoint. For example, when the Court reaches a decision conservatives would disagree with the holding is given but the dissent is quoted. This does not happen when the outcome is one that would please conservatives. The allegedly pernicious effects of some cases, such as *Roe v. Wade*, are discussed at length while the negative effects of others, such as *Plessy v. Ferguson*, are omitted. Except for an occasional editorial comment about judicial review leading to undesirable judicial activism, discussion of historical cases, such as *Marbury v. Madison*, is neutral although neither *Plessy* nor *Dred Scott* is characterized as being wrongly decided. Consistently, the authors of all the textbooks decry contemporary Establishment Clause jurisprudence with such language as "[t]he Lemon Test is truly a lemon."[11] By contrast, the authors are more ambiguous regarding the Free Exercise Clause decisions although they disparage those favoring the Free Exercise rights of believers whose religions are not part of fundamentalist Protestantism. Coverage given to free speech cases focuses on the pernicious effects of pornography and obscenity and on undesirable speech as immoral and, at times, contrary to the maintenance of an orderly society. Much of the discussion of freedom of assembly centers around the latter contention, especially the anti-war movement of the 1970s. The books devote a good deal of space to *Roe v. Wade* and uniformly condemn both the decision and abortion itself in extremely pejorative terms. In contrast, *Brown v. Board of Education* is condemned with faint praise. To the authors, the decision was questionable in terms of how it was made (Bob Jones's current events text) and as a vehicle for federal intrusion into matters that should be left to the states (A Beka). Although, in the main, the textbooks cover criminal law issues straightforwardly, they do argue in support of the death penalty and for the position that some Supreme Court decisions, notably *Furman v. Georgia* and *Miranda*, have led to a rise in crime (*Furman*) or hamstrung the police (*Miranda*).

IV Commentary

A. Policy implications

Assuming that children are influenced by what they read or what they are exposed to, that tolerance and respect for people of different religions and political opinions, and that the ability to compromise are crucial for a democratic society, then educating large numbers of American children and youth with textbooks such as those discussed in this paper would appear to be unwise. Moreover, using monies collected from taxpayers to encourage publications and to support institutions that denigrate that taxpayer's religious faith in the manner is fundamentally unfair. Moreover, the view that Christian and/or conservative evangelical Protestantism is the true faith with its corollary that other faiths are in error and false is clearly a religious belief. Could the government properly exclude schools that teach this doctrine from a voucher program? In addition, the use of public funds to inculcate students at the precollegiate level in partisan political ideology is extremely troubling.

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[8] MICHAEL R. LOWMAN ET AL., UNITED STATES HISTORY IN CHRISTIAN PERSPECTIVE: HERITAGE OF FREEDOM 219 (2d. ed. 1996).

[9] *Id.*

[10] *Id.* at 631.

[11] WILLIAM R. BOWEN ET AL., AMERICAN GOVERNMENT IN CHRISTIAN PERSPECTIVE 158 (2d. ed. 1997).

B. Legal implications

In *Bob Jones University v. United States*, the Supreme Court denied the University tax-exempt status on the grounds that University's racially discriminatory admissions policy was contrary to the public interest.[12] The Court found that the University's status as a § 501(c)(3) charitable institution should be revoked because its policies were "not in harmony with the public interest [and were] at odds with the common community conscience."[13] Even though the policies might spring from sincere religious beliefs, they were not "'beneficial and stabilizing influences on community life' [and should not] be encouraged by having all taxpayers share in their support by way of special tax status."[14] It can be argued that school curricula that encourages prejudice against other Americans on the basis of their religion is also neither a beneficial nor stabilizing community influence and should not be supported by all taxpayers. In *Marsh v. Chambers*, the Court upheld legislative prayers but opined that the result might have been different had the Nebraska legislative chaplain offered a prayer that "disparage[d] any other, faith or belief."[15] A court might well conclude that vouchers are unconstitutional because the curricula of some participating schools "disparages. . .other faith[s] or belief[s]."[16]

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[12] 461 U.S. 574 (1983).

[13] *Id.* at 591.

[14] *Id.* at 595 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)).

[15] 463 U.S. 783, 794 (1983).

[16] *Id.*

STUDENT LED PRAYER IN SCHOOL: SHIFTING GROUND IN THE 21ST CENTURY

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"The most significant aspect of the separation of church and state is not, as some seem to think, the shielding of the secular world from too strong a religious influence; the principal task of the separation of church and state is to secure religious liberty"[1]

INTRODUCTION

The recent highly-anticipated decision by the Supreme Court in Santa Fe Independent School District v. Doe[2] affirming the Fifth Circuit Court of Appeals decision in the matter has once again sent shock waves throughout the public school community on the issue of student prayer in the school setting. Even though Santa Fe was decided along very narrow lines of whether or not student-led prayer was appropriate at a high school football game, the debate rages on regarding the legality of student-led prayer at graduation ceremonies.

Followers of the debate that began almost forty years ago acknowledge that things changed markedly after the decision in Engel v. Vitale[3], when the Supreme Court sought to firmly re-establish the "wall of separation" first espoused by Roger Williams, founder of the state of Rhode Island. When Williams wrote of the "wall of separation between the garden of the Church and the wilderness of the world"[4], he expressed the popular New England Free Church ideal of toleration and religious plurality. Obviously, James Madison's *Memorial and Remonstrance* is correctly referenced by historians as the fundamental constitutional source of the separation of church and state. Madison's argument, drafted to head off Patrick Henry's bill to support all churches in Virginia by assessments from the population at large, was presented as a movement to rescue religious freedom from state oppression, not rescue the state from religious oppression. Along this line, Thomas Jefferson, often credited as being the progenitor of the "separation" theory, thought that religious liberty was "the most inalienable and sacred of all human rights."[5] From those humble beginnings along some arguably religious lines, many now seek judicial interpretation that would tend to turn the clock back to those earlier, simpler times. The battleground has been mainly fought in the public school setting, but has also involved city squares, county courthouses, and college campuses.

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[1] Carter, S. (1993) *The Culture of Disbelief.* p. 107. New York: Doubleday.

[2] Santa Fe Independent School District v. Doe, xxxxxxxxxx (2000).

[3] Engel v. Vitale, 370 U.S. 421 (1962).

[4] Adams, A. & Emmerich, C. *A Nation Dedicated to Religious Liberty.* (p. 6). Philadelphia: University of Pennsylvania Press. (1990).

[5] Jefferson, T. "Freedom of Religion at the University of Virginia", in Saul K. Padover, ed., *The Complete Jefferson*. 1943. (p. 958). New York: Duell, Sloane & Pierce.

The oft-quoted phrase, "As long as the State requires tests, there will be Prayer in schools", has been used as a battlecry by staunch advocates of the prayer-in-school movement. Much to their dismay, most court decisions over the last forty years have found that the state, as an actor in the process, cannot have any part in encouraging, promulgating, writing, or even allowing prayer by other actors, such as students, in the school setting. Some of the decisions have been based on the overt state involvement in the prayer itself (Engel[6] and Lee[7]), while others have been decided on less intrusive, and seemingly "more democratic", principles of majority votes by the students themselves (Harris[8] and Black Horse Pike[9]).

This paper will investigate the history of the "prayer in school" issue, review the precedent setting cases, look at some recent appellate court decisions, and determine if there is any constitutionally-protected procedures by which students may exercise their First Amendment rights in the school setting.

Government-Initiated Speech

Whenever one considers the meaning of the phrase "constitutionally-protected speech", the argument turns on what manner of speech it is that is seeking this "protection". Obviously, the individual citizen seeks protection in his speech not only from the government, but also from his neighbor's speech. The citizen believes he should have the right to speak and worship as he/she pleases regardless of the biases involved, but is not sure his neighbor should have similar expansive rights. And, it is certainly none of the government's business to monitor or prevent any the citizen's views, but his neighbors deserve some close scrutiny. An individual's right to freedom of speech is not absolute, however. Within the confines of the First Amendment is also found the "free exercise" of one's religious beliefs. When the government seeks to act as the protector, or guardian, of the speech of its citizens, it is often government speech that is indicted as the culprit even though it is individual speech that is being quashed. Supreme Court Justice Jackson gave us direction on what the limits of government speech are in relation to private speech:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, *religion*, or other matters of opinion or force citizens to confess by word or act their faith therein."[10]
> (emphasis added)

If one reads the word "official" in Jackson's eloquent statement to include not only school officials, but also court and legislative officials, one might assume that private rights do have a place in determining when and where student prayer, as protected private speech, is appropriate in the school setting.

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[6] Engel, supra

[7] Lee v. Weisman, 505 U.S. 577 (1992).

[8] Harris v. Joint School District No. 241, 41 F.3d 447 (9th Cir. 1994).

[9] ACLU v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3rd Cir. 1996)

Justice Stevens, writing for the majority in Wallace v. Jaffree, stated that every student has the "right to engage in voluntary prayer during an appropriate moment of silence during the schoolday."[11] The key words would seem to be "appropriate moment[s] of silence". It is well settled that schools have the right to maintain discipline in the classroom, even to the point of preventing student speech that "intrudes upon the work of the schools or the rights of other students."[12] In those "appropriate moments", the issue of what constitutes government speech and what constitutes student speech needs further definition.

There have been state attempts to legislate prayer in the school day. It is the ultimate in state establishment of orthodoxy that Justice Jackson warned about. An example is found in the State of Idaho, which currently has in its statutes the following imperative:

> "Selections from the Bible, to be chosen from a list prepared from time to time by the state board of education, shall be read daily to each occupied classroom in each school district. Such reading shall be without comment or interpretation. Any question by any pupil shall be referred for answer to the pupil's parent or guardian."[13]

Even though the statute was declared unconstitutional in a 1964 lawsuit,[14] it probably remains "on the books" in the furtive hopes that someday it will again come into vogue. The rejection of the statute in Idaho followed closely on the heals on the Supreme Court's decision in Engel v. Vitale[15] that set the tone nationwide regarding the attempts by states or their political subdivisions to mandate school prayer. But there were actors below the state legislature or state board level that did not feel so restricted, and the issue became one of determining when a citizen oversteps his individual role and enters into that of a governmental role.

The signal case in the matter of where to draw the line between government speech and private speech in the matter of prayer in the school setting is obviously Lee v. Weisman. In that decision, Justice Kennedy, writing for the majority, stated:

> "The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt the idea as its own. (citations omitted) The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse……in the hands of the government, what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[16]

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[10] West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).
[11] Wallace v. Jaffree, 472 U.S. 38 (1985).
[12] Tinker v. Des Moines, 393 U.S. 503 (1969).
[13] I.C. 33-1604
[14] Adams v. Engleking, 232 F.Supp. 666 (D. Idaho, 1964).
[15] Engel v. Vitale, 370 U.S. 421 (1962)
[16] Lee, supra

The Lee court believed that for the government (school) to even tolerate the "expression of religious views" could result in indoctrination. Of particular import to the Court were four factors:

1. The amount of control over the situation evidenced by the principal (control of the components of the ceremony; choosing a cleric; helping the cleric form his speech)
2. The involvement of a cleric in the ceremony (rabbi)
3. The relative young age of the students involved (junior high)
4. The fact that student attendance at the ceremony was, to a large degree, mandatory

Considering these four factors, one might assume that if there was less or no administrative control over the components of the ceremony, no cleric involved, voluntary rather than mandatory attendance, and the age of the student older than junior high, there might be some relief granted by the courts on the prayer-at-graduation issue.

Even with the Lee decision, and in the face of the Engel precedence, some states continued with plans to interject prayer into the school day by legislative fiat. Two of the more recent cases involve the state legislatures of Mississippi and Alabama in their attempts to allow prayer at school activities during the school day. The Mississippi statute would have "allowed prayer at compulsory or noncompulsory school events."[17] The Fifth Circuit enjoined enforcement of the statute in its entirety with the exception of the portion which permits prayers to take place at graduation services. The Alabama law would have permitted non-sectarian, non-proselytizing student-initiated prayer, invocations and benedictions during school activities, assemblies, sporting events, graduations, and other school-related events.[18] The district court ruled that not only was the law facially invalid, but attempted to establish a new standard of conduct by suggesting that the school district had an affirmative duty to prevent such speech from happening. The Eleventh Circuit Court, in vacating the Permanent Injunction by the district court, stated:

> "Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's - - either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved."[19]

The decisions clearly follow a pattern that show that either state sponsored prayer or state prohibition of prayer by students is unconstitutional. At some juncture, government intolerance of the expression of one's religious views must give way to the individual's right to express those views as part of his/her First Amendment rights unfettered by government control. A review of cases, which basically involve student-initiated religious speech, will reveal the plethora of creative ways students, and sometimes their adult supervisors, have tried to enter this First Amendment arena.

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[17] Engebretsen v. Jackson Public School District, 88 F.3d 274 (5th Cir. 1996).

[18] Chandler v. James, 180 F.3d 1254 (11th Cir. 1999).

[19] Id.

Student-Initiated Speech

We elect our leaders based on the time-tested method of majority rule. The one with the most votes wins, and the others become somewhat honor-bound to "follow the leader" after the elections have been validated. As we know full well, those who are not elected do not lose their voice in our democracy, and are still free to express their opposition to the policies of those who were elected.

One of the methods school districts have used in determining whether prayer should be a part in some school activities, including graduation ceremonies, is to allow students to vote on the format for the event. The vote is usually to determine, among other matters, whether or not to include prayer as part of the activity, and even to vote for a particular student officer or individual to present the prayer. Problems accrue, however, when such majoritarian processes are applied to First Amendment rights. When students vote on whether or not to have prayer at a particular event, to elect a particular person to give a prayer, or to vote on the form of prayer to be offered, the courts seem eager to intervene.

The first nationally recognized case involving a school district that sought student approval regarding the prayer issue was decided in the Fifth Circuit in 1992.[20] The Circuit Court held that a school board resolution that allowed members of the senior class to choose among student volunteers to deliver nonschool-sponsored, nonsectarian, nonproselytizing invocations at their own graduation ceremonies did not violate the Establishment Clause. An appeal of the decision ensued, but since the Supreme Court had issued its ruling in Lee only a scant year preceding Jones, cert was denied. Barely two years later, the Fifth Circuit again faced a school prayer issue involving the practice of a basketball coach sponsoring prayers at the end of games and practices. The Court ruled that the involvement of a school employee in such a leadership role crossed the line between government and private prayer in the school setting and was thus unconstitutional.[21] In the Duncanville decision, the Court explained their departure from the Jones ruling by stating that mundane school activities, such as basketball games and practice sessions, were not the "once-in-a-lifetime" event represented by a graduation ceremony wherein the court felt such leeway could be granted.

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[20] Jones v. Clear Creek Ind. School District, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

[21] Doe v. Duncanville Independent School District, 70 F.3d 402 (5th Cir. 1995).

Three cases in the four years following Jones highlight the increasing activity in the courts, and the disparity of opinions that could trigger another showdown at the Supreme Court. In the first, a Virginia school board was sued for allowing members of the senior class to vote on whether or not to have prayer at their graduation ceremony. A federal district court in Virginia declared that practice to be unconstitutional in 1993, and went on to specifically disagree with the Fifth Circuit's opinion in Jones when it stated:

> "Nor can the state simply delegate the decision as to a prayer component of that ceremony of the graduating class without offending the Establishment Clause. The notion that a person's constitutional rights may be subject to a majority vote is itself an anathema . . . . To the extent that *Jones v. Clear Creek* . . . permits such a delegation, this court respectfully rejects its reasoning.[22]

The second example involved a New Jersey school board, which enacted a new policy entitled "Religion at Graduation Exercises" in response to the Supreme Court decision in Lee.[23] The new policy had the support of several students who attended the Board meeting at which the policy was considered.[24] The policy allowed the officers of each graduating class to poll fellow classmates to determine if the seniors wanted "prayer, a moment of reflection, or nothing at all" as a part of their graduation ceremony. In June 1993, the vote produced the following results:

128	students voted for prayer
120	students voted for reflection/moment of silence
20	students voted to have neither

The Board moved forward with plans for prayer at the graduation ceremonies based upon the student vote. Basically, the Board planned to allow the 128 seniors who wanted verbal prayer to impose their will upon the 140 seniors who did not want a prayer at their ceremony. The Court stated:

> "The Board's position would have us recognize a right in that plurality to do so, and ignore the right of others to worship in a different manner, or in no manner at all. This we can not do because "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. " (quoting Wallace v. Jaffree, supra)

The Court further added:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's ...fundamental rights may not be submitted to a vote; they depend on the outcome of no election."[25]

Thus, even though the plurality of those who chose an option chose the prayer option, the Court clearly came down on the side of the overall majority of students who voted NOT to have a prayer.

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[22] Gearon v. Loudoun Co. School Board, 844 F.Supp. at 1100 (E.D. Va. 1993).
[23] Lee, supra
[24] Black Horse Pike, supra
[25] Id.

In the third case, Harris v. Joint School District 241 (41 F.3d 447, 1994), the Ninth Circuit also invalidated school prayer at graduation ceremonies where students had voted to have such as part of their ceremony. The Court said, "Elected officials cannot avoid constitutional mandates by putting them to a majority vote."[26] The Court further stated:

> "Only speakers chosen by the majority of the senior class are allowed. The message of the speakers is also chosen by the majority; the relevant speakers are instructed to pray. No matter what message a minority of students may wish to convey, the graduation forum is closed to them." *Id.*

With the decision in Harris, the Ninth Circuit continued its tradition that had been established over a decade earlier of frowning upon student prayer in the school setting where school officials had control. That trend was set in a California case in which the Student Council requested and was granted permission by the principal to open student assemblies held on school property during schools hours with prayer. The Ninth Circuit Court declared the practice invalid in 1981.[27] The Court declared that the fact that students set the assembly agenda and made decisions as to whether a prayer should occur, who would say the prayer, and how it would be said was insufficient to distance school officials from what would otherwise be an Establishment Clause violation.

In a more recent case, known as Adler II, the Eleventh Circuit found that the mere fact that a school board had developed a policy which allowed graduating students to vote on the decision about whether to have unrestricted opening and closing messages that students deliver at graduation ceremonies did not eliminate the factor of state control. The Court said:

> "Our review ... leads us to the conclusion that the delegation of the decision regarding a "prayer" or "message" to the vote of the graduating students does not erase the imprint of the state from graduation prayer."[28]

The court was quick to note that the record clearly showed that the establishment of the board policy was an attempt to circumvent Lee[29] in order to continue the district's long-standing tradition of prayer, and to permit sectarian and proselytizing prayer, at graduation ceremonies. The supreme Court will rule on the board's request for *certiorari* during the Fall 2000 term.

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[26] Harris, supra.

[27] Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981).

[28] Adler v. Duval County School Board, 174 F.3d 1236 (llth Cir. 1999).

[29] Lee, supra

Obviously, the "new kid on the block" case is Santa Fe Independent School District v. Doe,[30] in which the Supreme Court upheld the Fifth Circuit's decision. The ruling was on the very narrow issue of a policy that would allow a pre-game prayer by a student elected by the Student Council for that purpose and the attendant conditions that would surround that act. The student would be allowed to use the stadium PA system to deliver the prayer. The Supreme Court was concerned that not only was the student going to use school district facilities and a school sponsored event to deliver the prayer, but also that the student election system in question that determined the student who would lead the prayer "ensures that only those messages deemed 'appropriate' under the District's policy may be delivered."[31] The Court determined that very nature of the election would ensure that those with minority views on the topic would never have a chance to be heard.

The blistering dissenting opinion, delivered by Chief Justice Rehnquist, stated that the majority "bristled with hostility to all things religious in public life."[32] Because the Court did not learn until late in their decision-making process that respondents challenged the student-message program before it had been put into practice, the dissenters also questioned the validity of prohibiting an act before it had actually occurred.

There are many court opinions that look askance at student elections that tend to silence or disenfranchise those with opposing views to that of the majority. The courts have clearly stated that any form of state control over those who would say a prayer in the school setting is unconstitutional. It has been ruled a violation of the First Amendment for the school board or administration to somehow "delegate" prayer to student control. However, what if the prayers are truly student-initiated and student-led? And, what if there is no election preceding the event that would sully the occasion in "majoritarian" cloth? Additionally, what if the student speakers were chosen for wholly secular criteria and allowed to speak without the state's oversight or support? Even Justice Souter was moved to remark in Lee that:

> "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."[33]

Whether Justice Souter knew at the time of his remarks that such a case existed in the judicial system, or was merely prophetic, Doe v. Madison School District[34] exactly meets his announced criteria.

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[30] Santa Fe Independent School District v. Doe, 145 Educ.L.Rep. 21 (2000).
[31] Id.
[32] Id.
[33] Lee, supra
[34] Doe v. Madison School District No. 321, 147 F.3d 832 (9th Cir. 1998); *vacated* 177 F.3d 789 (9th Cir. 1999).

In Madison, the court found that school district policy provided for the top four academic students, as based on overall GPA, to give presentations at the graduation ceremonies. There was no administrative oversight of the student speech, no policy that students either say or refrain from saying a prayer, therefore no state imprimatur could be stamped on the students' remarks. It would seem that the limited open forum guaranteed in the Equal Access Act of 1984[35], where student-initiated, student-led prayer was possible in a school setting, could find its full flower in the Madison setting.

As Justice Mansmann stated in writing the dissenting opinion in Black Horse Pike:

> "The Establishment Clause should not be read to prohibit activity which the Free Exercise Clause protects. (citation omitted) Thus, I would analyze the present case in light of the fact that while the state may not establish a religion, it must not also disadvantage or discriminate against student religious activity, nor imply that religion, or religious acts, are disfavored."[36] (emphasis in original)

The record showed that neither the Madison School District school board nor its administration had any direct influence over the student speakers at graduation. Nor were there any elections involved to determine who the student speakers would be. The simple secular criteria of grade point average determined who would speak at the ceremony, and no oversight or review of the student's planned remarks by the administration or other school employees occurred. To further reduce the chance that the graduation ceremonies could have the effect of advancing religion, the District policy requires a disclaimer in every printed program. It reads:

> Any presentation by participants of graduation exercises is the private expression of the individual participants and does not necessarily reflect any official position of Madison School District #321, its Board of Trustees, administration or employees or indicate the views of any other graduate.
>
> The Board of Trustees of the Madison School District #321 recognizes that at graduation time and throughout the course of the remedial process, there will be instances where religious values, religious practices and religious persons will have some interaction with the public schools and students. The Board of Trustees, however, does not endorse religion, but recognizes the rights of individuals political, social, or religious views, for this is the essence of education.[37]

The Ninth Circuit concluded with:

> "We conclude that the District's graduation policy survives the Lemon Test. On its face, the policy has a secular purpose, its primary effect is not the advancement of religion, and it does not excessively entangle church and state."[38]

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[35] 20 U.S.C. §§4071 and 4072

[36] Black Horse Pike, supra

[37] Id.

[38] Madison, supra

It is important to note exactly how far the Ninth Circuit moved from a starting point of its 1981 decision in Collins through its 1994 decision in Harris to the Madison decision. Did the Court change its mind during that time? Did other factors enter in as the years went by? Or did one school district simply "get it right?" Perhaps part of the answer lies in an examination of student rights when viewed in the harsh light of government oversight in the following section.

Comparing Government-Initiated Cases with Student-Initiated Cases

> **"In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."**[39]

We say the above quote from Tinker like a litany..."Students do not lose their constitutional rights when they enter the schoolhouse door," yet what does it mean when students, parents, school administrators, and school board members of good will encounter First Amendment challenges in the courtroom? The issue at that time of Tinker was student Free Exercise rights in the form of symbolic speech within the school setting. Almost 20 years later, the key issue in Board of Education v. Mergens[40] was that Ms. Mergens merely sought permission to use vacant school space during the school day to hold a religiously-oriented meeting. She was refused permission because the building administrator thought it would violate the school's Establishment prohibition, when in actuality it violated Ms. Mergen's Free Exercise rights guaranteed in the Equal Access Act. As Justice O'Connor stated when writing for the Court in Mergens:

> "There is a crucial difference between government and private speech endorsing religion, and, as Congress recognized in passing the Act, high school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[41]

The Mergens decision expanded student rights to include student-initiated, student-led religious verbal speech, which set a new parameter that schools and courts have been trying to define for almost 20 years

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[39] Tinker, supra

[40] Board of Education v. Mergens, 496 U.S. 226 (1990).

That "crucial difference" would seem to be that if schools can develop secular criteria for selecting speakers at graduation ceremonies, and then allow students to exercise their First Amendment rights without restriction or censure, not only is the government exempt from Establishment claims, but the student can utilize their Free Exercise rights. Another crucial factor is that the Court acknowledged that high school students are "mature enough" to understand that the school is not endorsing speech it "merely permits on a nondiscriminatory basis. *Id.*

In reviewing the Supreme Court's stated concerns in Lee[42], we must consider the four factors they outlined as problem areas. They were (1) amount of administrative oversight, (2) the involvement of a cleric, (3) the relative age of the student, and (4) whether students are required (or expected) to be in attendance, or if their attendance at the event is voluntary. The following tables, "Selected Court Prayer Cases", take into account those areas, and also note whether or not other judicial/legislative imperatives are present in each case.

Table One tracks those cases where government-initiated prayer was one of the major issues before the court. These cases almost universally originated with government action, or actions by government players, such as a building principal. The courts have consistently ruled that when the government is the prime mover behind any prayer-related, or religiously enhanced, action in the public schools it is a violation of the First Amendment Establishment Clause. In all instances noted on Table One attendance by students was mandatory at the event, but the guidelines put forth in the Equal Access Law did not apply to the situation. In addition, the event was not a "once-in-a-lifetime" ceremony used as a determining criteria in the Jones[43] decision, nor were students consulted before the planned action by the government actors.

Table Two represents a totally different scenario. These cases almost universally originated with student action, or actions by groups of students, in an effort to introduce prayer into the school setting. In all instances, student attendance/participation was viewed as voluntary - - a key concern of the Lee[44] court. The first four cases in Table Two involved prayer or other religious activities in student activity sessions, but not at graduation ceremonies. Except for the decision in Mergens[45], the courts have been unanimous in rejecting these student-led efforts basically on the premise that the activities involved are not at the level of importance that would justify 'solemnization' with prayer.

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[41] Mergens, supra
[42] Lee, supra
[43] Jones, supra
[44] Lee, supra
[45] Mergens, supra

The last six cases all involve prayer at graduation ceremonies, and two-thirds of them have failed to receive judicial sanction for the activity. In all four cases that did not pass muster, one of the main issues was the fact that an election by students, or of students, was involved in the process. The courts have been fairly unanimous in refusing to allow any 'majoritarian' process to be used in determining either the message or the speaker. The lone exception was the Jones[46] court in which the "once-in-a-lifetime" criterion was introduced. The court felt that an event of that magnitude in the students' life would permit a "lifting of the veil" covering the "wall of separation."

The last case, Doe v. Madison School District[47], is unique in the annals of jurisprudence in that students are selected to give speeches at their graduation ceremony based solely on the secular criteria of grade point average. The four students so chosen are given complete freedom to frame their remarks in any manner that they wish. There is no school board policy urging them to pray, or prohibiting them from praying, nor is there any administrative review or oversight of their planned remarks. Since their selection is based on GPA, there is no election involved.

Even though the case would have provided an excellent set of facts on which the Supreme Court could have made a bright line ruling on the interaction between students' rights as found in the Equal Access Act and graduation ceremonies where speakers are chosen on secular criteria, Madison was vacated in 1999.[48] Two days after the initial decision, the objecting student graduated and an en banc Ninth Circuit Court dismissed the case as moot. Taxpayers in the school district were unable to convince the court that the case still presented a live controversy, or that school district policy involved the expenditure of public funds.

In conclusion, a "live controversy" still exists regarding student-initiated, student-led prayer at graduating ceremonies across the nation. Two of the circuits have, in some manner, allowed it to occur. Others appellate court decisions may follow as more school districts select their student graduation speakers on wholly secular criteria, and allow them to exercise their First Amendment rights in front of their peers, parents, and friends in this "once-in-a-lifetime" event.

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[46] Jones, supra

[47] Doe, supra

[48] Doe v. Madison School District No. 321, 177 F.3d 789 (9th Cir. 1999).

TABLE ONE

SELECTED COURT PRAYER CASES

(Government-Initiated Prayer)

CASE	Age of Student	Issue	Bd/Admin. Control over Student	Cleric Involvement	Ruling	Student Attendance	"Once-in-a Lifetime" event	Student Equal Access Controlling	Student Opinion/Input Sought
Engel v. Vitale 370 U.S. 421 (1961)	K-12	Daily reading of State Board formulated prayer to students	YES	NO	Violation of First Amendment	MANDATORY	NO	NO	NO
Abington v. Schempp 374 U.S. 203 (1963)	9-12	Daily reading of Bible verses to students over PA system	YES	NO	Violation of First Amendment	MANDATORY	NO	NO	NO
Lemon v. Kurtzman 403 U.S. 602 (1971)	K-12	Using state resources to supplement private school teacher salaries	YES	NO	Violation of First Amendment	MANDATORY	NO	NO	NO
Wallace v. Jaffree 472 U.S. 38 (1985)	K-12	State law authorizing tiem for "meditation or voluntary prayer"	YES	NO	Violation of First Amendment	MANDATORY	NO	NO	NO
Lee v. Weisman 505 U.S. 577 (1992)	Junior High	Prayer at Graduation	YES	YES	Violation of First Amendment	MANDATORY?	YES	NO	NO
Ingebretsen v. Jackson Public Sch. Dist. 88 F.3d 274 (Fifth Cir. 1996)	High School	State law allowing prayer at school events	YES	NO	Violation of First Amendment	MANDATORY	NO	NO	NO
Chandler v. James 180 F.3d 1254 (Eleventh Cir. 1999)	High School	State Law to permit prayer at school activities	YES	NO	Violation of First Amendment	MANDATORY	NO	NO	NO

TABLE TWO

SELECTED COURT PRAYER CASES

(Student-Initiated Prayer)

CASE	Age of Student	Issue	Bd/Admin. Control over Student	Cleric Involvement	Ruling	Student Attendance	"Once-in-a Lifetime" event	Equal Access Controlling	Student Opinion/Input Sought
Collins v. Chandler Unified Sch. Dist. 644 F.2d 759 (Ninth Cir. 1981)	High School	Student Council prayer at student assemblies	YES	NO	Violation of First Amendment	VOLUNTARY	NO	NO	YES
Board of Westside Comm. Schs. v. Mergens 496 U.S. 226 (1990)	High School	Prohibiting Student meetings on school grounds for Bible study	YES	NO	Violation of First Amendment NOT to allow Building use	VOLUNTARY	NO	YES	YES
Doe v. Duncanville 70 F.3d 402 (Fifth Cir. 1995)	High School	Prayer at school-related sporting events	YES	NO	Violation of First Amendment	VOLUNTARY	NO	NO	YES
Santa Fe Sch. Dist. v. Doe No. 99-62 (___ U.S. ___2000)	High School	Student vote to have prayer at Football Games	Moderate	NO	Violation of First Amendment	VOLUNTARY	NO	NO	YES
Jones v. Clear Creek Ind. Dist. 977 F.2d 963 (Fifth Cir. 1992)	High School	Student vote to have prayer at graduation	Minimal	NO	NO VIOLATION	VOLUNTARY	YES	YES	YES
Gearon v. Loudon County Sch. Bd. 844 F.Supp. 1097 (E.D. Va. 1993)	High School	Student vote to have prayer at graduation	YES	NO	Violation of First Amendment	VOLUNTARY	YES	YES	YES
Harris v. Joint Sch. Dist. 241 41 F.3d 447 (Ninth Cir. 1994)	High School	Student vote to have prayer at graduation	Minimal	NO	Violation of First Amendment	VOLUNTARY	YES	YES	YES
Adler v. Duval County Sch. Bd. 851 F.Supp. 446 (M. D. Fla. 1994)	High School	Elected student officer to give graduation prayer	Moderate	NO	Violation of First Amendment	VOLUNTARY	YES	YES	YES
ACLU v. Black Horse Pike Reg. Board of Educ. 84 F.3d 1471 (Third Cir. 1996)	High School	Student vote to have prayer at graduation	YES	NO	Violation of First Amendment	VOLUNTARY	YES	YES	YES
Doe v. Madison Sch. Dist. 147 F.3d 832 (Ninth Cir. 1998)	High School	Secular reasons for choosing student speakers for graduation	None	NO	NO VIOLATION	VOLUNTARY	YES	YES	YES

THE MILWAUKEE PARENTAL CHOICE PROGRAM: CAN THE PARTICIPATION OF SINGLE-SEX SCHOOLS BE JUSTIFIED?

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The Milwaukee Parental Choice Program: Can the Participation of Single-Sex Schools be Justified?

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INTRODUCTION

School choice has become a part of our national educational fabric. Thirty-six states, the District of Columbia, and Puerto Rico have legislation allowing charter schools. In addition, many states offer statewide open enrollment plans allowing students to attend any traditional public schools in their state. Numerous local school districts have created magnet schools and other types of intra-district choice plans. Publicly funded private school voucher plans exist in Milwaukee, Cleveland, Florida, Maine, and Vermont in some form or other. Voucher ballot measures appear this November in both California and Michigan. School choice has become a common element of elementary and secondary education policy.

Examinations of these types of programs abound. The bulk of the available literature focuses either on the propriety or the efficacy of such plans a matter of public policy. In addition a significant number of scholars have addressed the constitutionality of including religious schools in the publicly funded voucher programs. Still, with all the attention focused on choice, one issue has received comparatively modest consideration; using single-gender institutions to further school reform.[1] Does single-gender education have a place in these school reform efforts? Can our definition of public education allow such gender concentration and the exclusion that defines it? These are more than hypothetical questions. Public funds are currently flowing to single-gender schools in both charter school context[2] and voucher contexts.[3]

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[1] This is not to suggest, that scholarship is silent on the issue. It is not. Some examples of literature addressing the issue include: Bellman, A. The Young Women's Leadership School: Single-Sex Public Education After V.M.I., 1997 Wisconsin Law Review 827 (1997); Campbell, P & Wahl, E. Of Two Minds: Single-Sex Education, Coeducation and the Search for Gender Equity in K-12 Public Schooling, 14 New York Law School Journal of Human Rights 289 (1997); Caplice, K. The Case for Public Single-Sex Education, 18 Harvard Journal of Law and Public Policy 227 (Fall, 1994); Hsiao, L. 'Separate But Equal' Revisited: The Detroit Male Academies Case, 1992/1993 Annual Survey of American Law 85 (April 1993); Reiter, J. California Single-Gender Academies Pilot Program: Separate but Really Equal, 72 Southern California Law Review 1401 (July, 1999); Sandler, B. Publicly-Supported Single Sex Schools and Policy Issues, 14 New York Law School journal of Human Rights (1997); Schuld, K. Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal, 1999 University of Chicago Legal Forum 461 (1999);

The Milwaukee Parental Choice Program (MPCP; WI Stat. §119.23) provides a case in point. Given the intense scrutiny aimed at the MPCP, it is surprising that one fact has been largely overlooked. Since the expansion of the program to include religious schools was approved by the Wisconsin Supreme Court in 1998,[4] the State has allowed single-gender private schools to participate in the program.[5] For the 1999-2000 school year, four schools fit that description. Marquette University High School accepts only boys. Divine Savior Holy Angels High School, Notre Dame Middle School, and St. Joan Antida High School accept only girls.[6] The State's approval of these schools' participation in the program raises the question of whether this practice constitutes unjustifiable sex discrimination.

This presentation and the outline below explore the legality of State's approval of these four schools' participation in the MPCP under the Fourteenth Amendment to the U.S. Constitution, Title IX of the Education Amendments of 1972 (20 U.S.C. 1682 et seq.), and the Wisconsin Pupil Nondiscrimination Act (WI Stat. §118.13). The examination culminates in a proposed standard to guide the participation of single-gender schools in the MPCP.

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[2] See, for example, California's Single Gender Academies Pilot Program Act of 1996 (Cal. Educ. Code §§58520-58524 (West 1996)).

[3] The Milwaukee Parental Choice Program.

[4] Jackson v. Benson, 578 N.W.2d 602, 126 Ed. Law Rep. 399 (Wis. 1998); *cert. denied* 119 S.Ct. 466 (Nov. 9, 1998).

[5] This issue was briefly addressed as part of a larger examination of all Milwaukee publicly funded school choice programs by the Public Policy Forum in June 2000 under the title, "Public Funded School Choice Options in Milwaukee: An Examination of the Legal Issues." Copies of the larger report are available through the Public Policy Forum (www.publicpolicyforum.org). That research and portions of the research completed for this article were supported by the Public Policy Forum of Milwaukee, Wisconsin with funding from the Joyce Foundation of Chicago, the Richard and Ethel Herzfeld, Halbert and Alice Kadish and the Faye McBeath Foundations of Milwaukee.

[6] 1999-2000 MPCP enrollment figures list the following: Marquette University High School – 16 students; Divine Savior Holy Angels – 8 students, Notre Dame Middle School – 48 students, and St. Joan Antida High School – 122 students. Total enrollment for the program for the same period equaled 8,104 students.

OUTLINE OF LEGAL ANALYSIS

I. The responsibility for ensuring non-discrimination falls on the State.

a. Sex discrimination is prohibited under both state and federal law.

b. The State is responsible for ensuring that all public benefits are available without regard to status characteristics, including sex.

c. The MPCP is a public program. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992).

d. Provisions of the MPCP regulations requiring participating schools to ensure compliance with the Wisconsin Pupil Non-Discrimination Act and various federal civil rights statutes were removed as part of a compromise with the legislature's Joint Committee on Administrative Rules in 1998. Instead, each school's intent to participate form must attach a copy of "the original letter from State Superintendent Benson regarding student rights . . . signed by the school administrator." [7] Benson's letter informs administrators that "Judge Susan Steingass ruled [at the trial level] in *Davis v. Grover* [8] . . . that the attached student rights apply to private schools participating in this public program. The Judge also ruled that DPI has an obligation to advise participating schools of these state and federal provisions." Administrators must then sign the letter, under the following statement:

> I hereby acknowledge I have received and read this letter which is not to be construed as an agreement between DPI and the school, and further, is not to be construed as an admission that the student rights provisions attached hereto apply to schools participating in the choice program.

The list reads as follows:

> The Wisconsin Pupil Nondiscrimination Act, s. 118.13 and PI 9, which prohibit discrimination against students on the grounds of sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.

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[7] MPS-PCP-2 (Rev. 2/99), p. 2, item 9.

[8] No. 90-CV-25765 (WI Circuit Court, Dane County 1990).

Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 et. seq., which prohibits discrimination on the basis of sex in educational programs.

The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 et. seq., which prohibits discrimination on the basis of age in programs or activities.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 et seq., which prohibits discrimination on the basis of handicap in programs and activities. To comply in [sic] Section 504, DPI must ensure that no qualified handicapped persons are excluded from its programs; and must assure that all handicapped students in funded placements have opportunity for a free appropriate education.

The Family Rights and Privacy Act, 20 U.S.C. 1232g, 34 CFR 99 which regulates access and release of student's educational records.

All federal and state constitutional guarantees protecting the rights and liberties of individuals including freedoms of religion, expression, association, against unreasonable search and seizure, equal protection and due process.

All regulations, guidelines, and standards lawfully adopted under the above statutes by the appropriate administrative agency.

Pupils charged with misconduct and subject to suspension or expulsion shall be accorded state and federal constitutional due process of law.

e. The question of whether individual schools are bound by the constitutional and statutory requirements is a separate question not under examination for the purposes of this paper. Since the State is fully bound by all constitutional and statutory provisions, the liability of individual schools is not dispositive to the question of whether the State has complied with its obligations to guarantee non-discrimination on the basis of sex. Still, all participating schools, including the four single-sex schools, must sign a letter from State Superintendent Benson putting them on notice that Title IX and the Wisconsin Pupil Nondiscrimination Act have been found applicable to the schools in the MPCP by Judge Steingass at the trial court level in *Davis v. Grover*. That portion of Judge Steingass' ruling was not appealed and therefore, neither the Wisconsin Court of Appeals nor the Wisconsin Supreme Court considered the issue in subsequent rulings in *Davis*. Nor did the issue come up again in *Jackson v. Benson*. DPI also warns participating schools that those schools that receive monies through Title I of the Elementary and Secondary Education Act (20 U.S.C. §6301) are individually bound by the restrictions of Title IX as "recipients" of federal dollars under the law. Approximately 63 of the 91 schools participating as of 2/99 receive such funding, according to the cover letter accompanying Benson's notice.

II. The current participation of single-gender schools in the MPCP violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

a. ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

b. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). This case involved the exclusion of men from a state-operated program for nursing. The Supreme Court's decision established a heightened scrutiny standard that single sex education must be founded on an "exceedingly persuasive justification" and must show that "the classification serves an important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." (at 724).

c. *U.S. v. Virginia.*, 518 U.S. 515, 116 S.Ct. 2264 (1996). This case found that the Virginia Military Institute (VMI) violated the 14th Amendment by excluding women. It further found that the state's remedy for the violation, the creation of the Virginia Women's Institute for Leadership, was insufficient and did not place women in the position they would have occupied absent the discrimination. The decision reiterated the heightened scrutiny standard for considering state's use of any gender-based classification. As Justice Ginsburg summarized Virginia's error: "Virginia, in sum, has fallen far short of establishing the exceedingly persuasive justification that must be the solid base for any gender-defined classification" (internal quotations and citation omitted).

d. *Garrett v. Board of Education of the School District of the City of Detroit*, 775 F.Supp. 1004, 70 Ed. Law Rptr. 1101 (E.D. Mich. 1991). This case rejected the plans of the Detroit School District to create an all-boys school. The court accepted that the district had an "important governmental interest," in improving the education of boys, but was unwilling to accept that segregating boys from girls is substantially related to that goal. The court stated, " there is no evidence that the co-educational system is failing urban males because females attend schools with males."[9]

e. Application to of the heightened scrutiny standard to the State's allowance of the participation of MPCP single-sex schools indicates the State would have difficulty surviving scrutiny on the issue. If challenged, the State would have to justify allowing these four schools to participate in the program. The State could be expected to make the argument that creating more opportunities in the choice program furthers an important governmental interest. However, it would be difficult for the State to support the assertion that the 194 seats made available by these schools' participation is "substantially related" to the success or failure of the program or that this justification meets the standard of "exceedingly persuasive" set by the Supreme Court in *U.S. v. Virginia*. In addition, the current single-gender MPCP opportunities are not balanced between the sexes. Girls have over 160 more seats available in single-gender schools than do boys. Although some have argued that single-gender education is more defensible for girls based on current research, the State would have difficulty in asserting that body of literature as a defense since neither the schools nor the State had that issue in mind when the decision to allow the all-girl schools to participate was made.[10]

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[9] Garret, at 1008.

[10] See, for example: Bellman, A. The Young Women's Leadership School: Single-Sex Public Education After V.M.I. 1997 Wisconsin Law Review 827 (1997). In distinguishing the Young Women's Leadership School from

III. **The current participation of single-gender schools in the MPCP violates Title IX of the Education Amendments of 1972 (20 U.S.C. 1682 *et seq.*).**

a. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...."

b. The State is a "recipient" under Title IX. "'Recipient' means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof" (34 C.F.R. §106.2).

c. The State must ensure that its programs comply with Title IX's proscriptions. "Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part" (34 C.F.R. §106.4, emphasis added).

d. The MPCP is a public educational program operated by the State that must be free from gender discrimination.

e. The regulatory exception for single-gender schools does not apply to the State. An LEA with proper justification may operate a single-gender school as long as the LEA "makes available . . . pursuant to the same policies and criteria for admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools" (34 C.F.R. 106.35(b)).

V.M.I., Bellman concludes the following: In other words, after V.M.I., the justification for a policy that treats individuals differently based upon gender must be genuine at the time the policy was adopted. The Young Women's Leadership School is likely to withstand an equal protection challenge under skeptical scrutiny because it was designed to provide girls with educational opportunities equivalent to those enjoyed by boys in coeducational schools, and because it was based upon scientific research rather than sex-role stereotypes" (at 863).

f. The State appears not to have made any attempt to be sure the single-sex educational benefits afforded by the inclusion of the participating single-gender MPCP schools balance opportunities for boys and girls equally. Accordingly, the State's approval of the schools' participation appears to violate Title IX.

IV. The current participation of single-gender schools in the MPCP violates Wisconsin Pupil Non-discrimination Act (WI Stat. §118.13).

a. "No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability."

b. The regulations promulgated for the Act define discrimination as "any action, policy or practice . . . which denies a person or group of persons opportunities, privileges, roles, or rewards based in whole or in part on sex" (WI PI §9.02 (5)).

c. If, as Judge Steingass concluded, this state statute applies to the MPCP schools, it would appear that including single-gender schools violates the Act. The State has put each participating school on notice of the application the Wisconsin Pupil Non-discrimination Act through the requirement that each school submit a signed copy of the letter to that effect with each year's application to participate in the program. In essence, the State cannot have it both ways. If the Act applies to the MPCP as the letter implies, then the State must comply with its dictates as well.

PROPOSED STANDARD

Given the three sources of legal authority reviewed above and the current scrutiny applied to single-gender schools, two primary lessons can be distilled:

1. The State must justify any single-gender decision made at the outset, not as an afterthought to maintain the status quo.

2. If justifiable single-gender options are used, the State must be able to demonstrate that comparable benefits are available to each sex.

Although a question remains as to whether the State of Wisconsin can meet the first criteria in a satisfactory manner even after attending to the issue, continuing on the current path appears to invite litigation. Therefore, it seems prudent that the State clearly articulate its rationale for allowing MPCP participation by single-gender schools and then take affirmative steps to ensure that the benefits available to each sex are balanced.[11] One way the State might be able to meet its obligations for non-discrimination on the basis of gender would be to approve single-gender school participation in pairs or combinations. In other words, a single-gender school would have to find a partner school with which to apply for participation in the MPCP under what could be called a policy of "paired participation." That is, in order to balance single-sex opportunities for both boys and girls, the State could approve the participation of private single-gender schools in the MPCP in pairs or combinations of boys-only schools and girls-only schools. Such participation could then be approved if the partnered schools had comparable programming and offered a reasonably similar (if not equivalent) number of seats to MPCP students. In that way, the benefits of the MPCP would arguably be available without regard to sex.[12]

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[11] For example, California incorporates notions of balance into its Single Gender Academies Pilot Program Act of 1996 with the following language:
(b) . . . It is further the intent of the Legislature that if a particular program or curriculum is available to one gender, it shall also be available to those pupils in the other gender who would benefit from the particular program or curriculum.
(c) It is further the intent of the Legislature that single gender academies operated pursuant to this chapter offer the following:
(1) Diversity in educational opportunity.
(2) Equal opportunities at both boys' and girls' academies.
(3) Equal funding and facilities at both boys' and girls' academies. (Cal. Educ. Code §58521 (West 1996)).

[12] In the alternative, the State could use what has always been described as an "experimental" program to explore the efficacy of single-gender education in the urban setting. To take this approach, the State would have to require that single-gender schools agree to evaluative measures not required of other schools in order to test the experiment. That way the State could track the progress of students electing single-gender education and could determine whether children's educational achievement was enhanced by the availability of the single-gender option. Since one might predict that these schools would find such additional scrutiny unappealing and perhaps even objectionable, this approach to justifying the participation of single-gender schools seems less practical.

CONCLUSION

In order for the State of Wisconsin to withstand judicial scrutiny on its approval of the participation of single-gender schools in the Milwaukee Parental Choice Program, it must take some affirmative steps to justify its actions in this matter. As currently constituted, the State would be hard-pressed to convince a court that including these schools in the MPCP is consistent with either the Fourteenth Amendment, Title IX or the Wisconsin Pupil No-Discrimination Act. Adopting a standard of paired participation might allow the program to continue offering single-gender options to low-income students participating in the MPCP while still honoring the principles of non-discrimination inherent in the both federal and state law.

PRACTICAL TIPS FOR REPRESENTING SCHOOL CLIENTS: AN ETHICAL PERSPECTIVE

BY: JEFF HORNER
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EDUCATION LAW ASSOCIATION NATIONAL CONVENTION

ATLANTA, GEORGIA
NOVEMBER 9-11, 2000

OBJECTIVES OF THIS SESSION

- To provide school lawyers with ethical tips in representing school clients; and
- To minimize professional malpractice in the representation of school clients.

ETHICAL TIPS FOR REPRESENTING SCHOOL CLIENTS

1. Know and remember who your client is - the educational entity or the individual you represent.
2. Use engagement letters, both with educational entities and individuals who you represent - *See* Exhibit "A" for an example.
3. Resolve conflicts as soon as possible, preferably at the outset of a case or matter.
4. Secure the services of independent or separate counsel when a conflict arises.
5. Be prepared for the expected, but expect the unexpected.
6. Know your limits, and secure the assistance of legal specialists on matters beyond your expertise - *e.g.*, do not try to become an environmental lawyer if you do not know anything about environmental law.
7. Do not give an oral legal opinion when you do not know the answer to the question - state that before providing an opinion, further study is needed.
8. Reduce your legal opinions to writing when necessary, and qualify your opinions where appropriate - *See* Exhibit "B" for an example.
9. When necessary, document your advice through follow-up letters or memoranda to the file.
10. Assist the school board in reaching a consensus and discussing its legal options, but do not tell board members how to vote - other issues must be evaluated by board members in the voting process, *e.g.*, political and educational issues.
11. Do not engage in serving your self interests.
12. Be proficient enough politically not to let your personal political views influence the advice given to clients.
13. Beware of modern technology - do not send clients a letter or e-mail that you would not want to see on the front page of the local newspaper.

14. Sort out your emotions - do not let your personal relationship with school board members or school employees adversely affect your legal advice.

15. Know your jurisdiction's ethical rules.

16. Preserve your privileges, particularly the attorney/client communication privilege.

January 1, 2000

Dr. Billy Bubba Smith
Superintendent
Cut'n Shoot Independent School District
P. O. Box 1234
Cut'n Shoot, Texas 12345

Dear Dr. Smith:

We appreciate the opportunity to represent the Cut'n Shoot Independent School District ("District"). The purpose of this engagement letter is to set forth the role and responsibilities of both Dewey, Cheatham & Howe, L.L.P. and the District.

1. Scope of Engagement. As counsel for the District, we will provide legal services as requested by the District. Members of our firm will work on assignments provided to us by you, as the Superintendent, your designee, or the President of the Board of Trustees. Our ultimate responsibility is, of course, to the District as represented by the Board of Trustees. While I will be your primary contact, other members of our firm may perform work for you when specialized needs arise. It is our practice to assign specific tasks among lawyers, legal assistants, law clerks, and document clerks in such a way as to produce quality work at a reasonable expense to you.

2. Fees. Our fees will be billed on an hourly basis. You will be billed monthly, unless the parties agree otherwise. The District will pay our fees within thirty (30) days of billing.

3. Incidental Charges. All incidental charges and costs will be included in our bills.

4. Invoices. We will submit statements to you for our unpaid fees and expenses on a quarterly basis. The District agrees to pay these statements within thirty (30) days after receipt. You are encouraged to review our statements and discuss any questions with us concerning the level of activities and the nature of the services rendered. If you believe that expenses are mounting too rapidly, please contact us immediately so we can assist you in evaluating future alternatives. If we do not hear from you, we will assume that you approve of the overall level of activity taken on your behalf.

5. Cooperation. To enable us to render effective legal services, the District has agreed to advise us of all facts and keep us informed of all developments relating to the matters of our representation. We necessarily must rely on the accuracy and completeness of the facts and information the District provides us. Also, we cannot address any concerns with our representation

EXHIBIT A

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unless we have knowledge of the concerns. Accordingly, if any problems or concerns arise during the course of our representation, please call us so the concerns can be addressed at the earliest possible time.

6. "At Will" Engagement. Our engagement by the District is "at-will," and may be terminated by either of us at any time by written notice to the other party.

7. Documents. We will maintain any documents furnished to us by the District in our client file. At the conclusion of any matters, it is the District's obligation to inform us which documents it desires returned to the District. We will retain any remaining documents on our files for a limited time before ultimately destroying them in accordance with our record retention program.

If the foregoing correctly reflects your understanding of the terms and conditions of our representation, please have the President of the Board of Trustees execute the enclosed duplicate original of this letter in the space provided below. We ask that you also sign to acknowledge the agreement. Please return one executed copy to us.

We are very pleased to have this opportunity to work with the District. Please contact us if you have any questions now or in the future. Thank you for your confidence.

Very truly yours,

Dewey, Cheatham & Howe, LLP

Allen Ambulance-Chaser

APPROVED:

By: ______________________________ ______________________
Mr. Bobby Bubba Bovine, President Date
Board of Trustees
Cut'n Shoot Independent School District

By: ______________________________ ______________________
Dr. Billy Bubba Smith, Superintendent Date
Cut'n Shoot Independent School District

January 1, 2000

Bloated Bank
1234 Wall Street
New York City, New York 12345

Re: Municipal Lease/Purchase Agreement (Lease) between Bloated Bank (Lessor) and Cut'n Shoot Independent School District (Lessee) - dated January 1, 2000

Dear Sir or Madam:

We have acted as special counsel to the Lessee, a public school district and political subdivision existing under Texas law, in connection with the above-referenced transaction. We have been requested by the Lessee to render this opinion for the purposes of this transaction only.

We have examined: (i) a copy of the Lease to be executed by the Lessee and its attachments, and (ii) such other documents, materials, and/or records we have deemed necessary. We have also relied on both the written and oral representations and certificates of Lessee's officials as to various factual matters relating to this transaction, and have made an investigation of the laws related to this transaction as we have deemed necessary. We have assumed the genuineness of all signatures, the authenticity of all documents and records submitted to us, the conformity to the original records of all documents and records submitted to us as copies, and the truthfulness of all statements of fact made to us concerning this transaction. Where appropriate, we have suggested revisions to the Lease, which we believe are necessary to bring the Lease into conformity with Texas law. To the best of our knowledge, these revisions have been incorporated into the Lease. This opinion is subject to the inclusion of these revisions.

We offer no opinion related to, either directly or indirectly, the law regarding arbitrage, usury, or state/federal taxation, other than the specific matters listed below. Moreover, we have assumed the authorization, execution, and delivery of the Lease by the Lessor. Also, we have provided no advice and offer no opinion on the business aspects of the Lease; all business decisions are left to the discretion of the Lessor and Lessee. Based on these qualifications and any other limitations or assumptions set forth in this opinion, we are of the opinion that:

EXHIBIT B

1. The Lessee is a Texas political subdivision, with the requisite power and authority to incur obligations, the interest on which is exempt from taxation by virtue of Section 103(a) of the Internal Revenue Code of 1986;

2. The execution, delivery, and performance of the Lease by the Lessee have been duly authorized by all necessary action by the Lessee; and

3. The Lease constitutes a legal, valid, and binding obligation of the Lessee, enforceable in accordance with its terms;

We express no other opinion, either express or implied, as to any matter of law or fact regarding this transaction, other than the matters specifically stated in this opinion. This opinion is solely for the benefit of Lessor, and may not be relied upon by Lessee or any other person or entity for any purpose.

Very truly yours,

Dewey, Cheatham & Howe, LLP

cc: Dr. Billy Bubba Smith
Superintendent
Cut'n Shoot Independent School District
P.O. Box 1234
Cut'n Shoot, Texas 12345

A FRAMEWORK FOR ADDRESSING STUDENT TEST USE ISSUES

Presented By:

Arthur L. Coleman
Nixon Peabody, LLP
Washington, D.C.

46th Annual Education Law Association Conference
November 9-11, 2000
Atlanta, Georgia

A Framework for Addressing Student Test Use Issues*

Arthur L. Coleman
Nixon Peabody, LLP
Washington, D.C.

INTRODUCTION

In the last decade, accountability became the driving force behind public education reforms. Echoes of "are my child's teachers qualified?," "does my child's school measure up to others?" and "does my child know enough?" continue to reverberate in conversations about the performance of our schools nationwide. Few educators dispute the importance of accountability in education, but many vigorously disagree about how to ensure accountability for students, teachers, and schools—especially when the subject of test use arises.

Education reforms that rely on high-stakes tests to measure student achievement have increased the focus on the legal parameters and educational principles that should guide decisions about student promotion and high school graduation. This article will describe the central legal and educational principles that should guide the development and implementation of tests used in these critical, high-stakes decisions. Ultimately, the lessons to be derived from federal jurisprudence, educational research and practice, and psychometric principles are as simple as they are important. They are:

- The determination of whether a test is valid cannot be made without knowing the educational objective and purpose of the test. A test may be valid for one situation or use and invalid for others; likewise it may be valid when measuring the performance of some test-takers and not others.
- Any test with high-stakes consequences for students must be valid for its particular use. This means tests designed to measure learning and used to determine high school graduation or advancement from grade to grade must fairly measure what the student has been taught. As a general proposition, there must be alignment among the curriculum, instruction and material covered on such a high-stakes assessment. Issues related to accommodations or alternative testing for students who are not fully proficient in English and students with disabilities must also be examined with care to ensure that the testing of these students corresponds to their particular educational programs.
- Test results can provide very valuable guidance in deciding whether to promote a student. However, a test is only

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* An earlier version of this article appeared in *Inquiry & Analysis* (NSBA Council of School Attorneys, Mar. 1999). Segments of this article are taken from: Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 VA. J. SOCIAL POL. & L. 81 (Fall 1998), which provides more extensive and detailed coverage of the issue. Citations to the legal, educational and psychometric principles set forth herein can be found in that article. Segments used with permission. Readers interested in this issue also should review: National Research Council, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION. (J. Heubert & R. Hauser, eds., 1999). *See* Appendix D for other related resources.

one tool among many. Many factors—some relating to what a test measures, and some not—may affect a student's performance on a particular test. Not surprisingly, therefore, psychometric standards confirm that a single test score should not be used as the sole criterion to make high-stakes educational decisions, such as high school graduation or promotion from grade to grade.

- The existence of statistically significant disparities in test scores among discrete student populations (*e.g.*, minority-non-minority; urban-rural) should cause further inquiry and examination regarding the relevant educational program and associated testing practices. Group differences in test scores may reflect a range of causal factors unrelated to the test, such as lack of preparation for the test, or they may reflect a problem with the test itself. Strategic and systematic monitoring of results over time can help prevent (and cure) problems of test bias, other discriminatory practices, or programmatic deficiencies affecting student learning.

EDUCATIONAL RIGHTS AND RESPONSIBILITIES: SOME FOUNDATIONS

Several fundamental principles underlie the framework of questions policy makers and educators should consider to ensure testing practices appropriately influence educational decisions about student advancement. These guiding principles have: (1) influenced an array of federal court decisions since the 1954 decision in *Brown v. Board of Education*;[1] (2) shaped federal educational policy since at least 1993; and (3) informed the policy choices in numerous states and locales that have grappled with standards-based reform issues.

Principle One: The basic obligation of public educators is to teach students, with their different backgrounds and abilities, the knowledge and skills they need to progress academically and mature with meaningful expectations of a productive life.

Simply put, the job of the public educator is to prepare students to be successful members of society. This educational mandate is no less present during classroom instruction than it is when educators administer, evaluate and act on student test results. Tests, in short, should be instruments used by educators to accomplish this goal. Thus, policy makers and the education community must work to guarantee that the establishment of high standards for all students does not unfairly deny educational opportunity to any one student.

Principle Two: The goals of guaranteeing excellence by promoting high academic standards and ensuring that all students have fair opportunities to achieve success in public education are inseparable, mutually dependent goals.

The goals of excellence through high academic standards and the opportunity for students to achieve success in public education are corresponding, coextensive goals—not, as some maintain, irreconcilable objectives. Policy makers and the education community should approach the issues regarding the use of high-stakes tests with a commitment to ensure that all students can learn in an environment in which standards are high and in which "all" means "all." They must appropriately address the right questions when designing and implementing test-related reforms so that all students receive the opportunity to learn to standards that reflect the curriculum and instruction, and that are measured fairly.

Principle Three: If it doesn't make educational sense, it can't make legal sense under federal civil rights laws.

The legal standards that guide the enforcement and adjudication of federal civil rights laws related to student access to education are

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[1] 347 U.S. 483 (1954).

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ultimately premised on educational judgments—not some abstract legal theory. For instance, in claims of race, national origin or sex discrimination in education, the dispositive questions posed by the courts center upon the adversity to a student's (or group of students') educational opportunity. The courts focus on the foundations for the educational decision-making leading to the challenged practice.

FEDERAL LEGAL STANDARDS AND INQUIRIES

The parameters that should guide educators in the design and use of high-stakes tests can be found in an array of federal cases raising race discrimination and due process challenges in the elementary and secondary context. The legal inquiry under a typical (non-intentional) race discrimination challenge is:

- Does the use of the test cause an adverse racial impact: does the use of the test cause a denial of educational opportunities to students of one race in numbers significantly disproportionate to the numbers eligible for the educational opportunity being denied—when compared to students of other races? and
- Is the use of the test educationally necessary: is the test valid for the particular purpose used and, if so, are there feasible, less discriminatory alternatives that would as effectively serve the educational objectives identified by the school?

The federal due process inquiry typically centers on the sufficiency of the notice of the testing requirement and the opportunity that students have had to learn the material tested. The legal inquiry is:

- Are students denied educational benefits or opportunities to which they have a legitimate claim, based on their test scores? In legal terms, is there a denial of a property right or liberty interest? and
- Have the students been provided with a fair opportunity to pass the test? More particularly, is the test valid for the purpose used?

Whether it is a claim of discrimination or a broader claim of unfairness in the test design or in test-related practices, the ultimate question upon which the typical federal legal analysis hinges is one of educational sufficiency: is the test valid for the purposes used for all students taking the test? The questions in each instance are, in simple terms: Does the test do what it is intended to do? Are the inferences derived from test scores and the educational judgments based on those inferences appropriate?

The federal courts have also affirmed some psychometric principles that demonstrate the highly complex, contextual and fact-intensive nature of the inquiry regarding the validity of the use of test results. Accordingly, no one-size-fits-all formula can guide decision making regarding test use—particularly with regard to high-stakes decision making, about how to link test results to student promotion from grade to grade. However, principles derived from the federal cases dealing with the issue of standards, equity and high-stakes test use can be distilled into questions that should be thoroughly examined and addressed when schools consider high-stakes testing.

FRAMEWORK TO GUIDE THE USE OF HIGH-STAKES TESTS

What are the educational objectives or justifications that support the use of a particular test?

Before any state or district administers any test, the objectives of the testing exercise should be clear: what are the goals for and uses of the test? The answer to this question

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will guide all other relevant inquiries about whether the test is educationally appropriate. Judgments about a test's validity are impossible, and the conclusions one may draw from the results are meaningless, absent clear test use objectives. For example, one cannot conclude that a particular test of ninth grade science proficiency is, as a general proposition, a valid test. A test of student achievement and learning fully aligned with District A's ninth grade science curriculum and instruction and validated according to professional standards for such use may be an appropriate consideration when making promotion decisions about students taking the test. Conversely, that same test, if used as a tool to make special education decisions or used to determine college admissions, would neither pass legal nor psychometric scrutiny. In fact, the test would not necessarily be appropriate to use with District B to measure ninth grade science proficiency absent a determination that material tested was fairly representative of the material taught in District B's ninth grade science courses.

Not surprisingly, compliance with federal legal standards related to due process and discrimination protections rests, in the first instance, upon the educational judgment about the purpose and use of the test. Central to this inquiry is the issue of whether high-stakes consequences attach to the test results at all. Is the test designed to monitor a student's or school's performance and to inform educators over time about the need for additional resources? Or, is the test designed as a gatekeeper, so that failure has particular and real consequences for the student taking the test? Absent a denial of educational opportunity to particular students, federal constitutional or statutory protections designed to ensure fair and equitable opportunities for students are less likely to be triggered. Even if a test is not high-stakes, civil rights protections may apply where the opportunity to take the test is itself an educational benefit, and that opportunity is denied on the basis of race, national origin, gender or disability. If the test use in question has high-stakes consequences, then the ultimate legal inquiry parallels the ultimate educational question: Do the test results at issue allow for informed and consequential decisions to be made about students taking the test? In other words, are the conclusions derived from the test results valid?

Is there alignment between the material tested and the curriculum and instruction? Have the students who must achieve to a school's academic standards been provided the necessary instruction to give them a fair opportunity to do so?

As instruments designed to inform students, parents and educators about success in meeting educational goals, high-stakes tests should be developed and administered as part of the educational effort to improve student performance; they should be integrated into the overall educational program. When tests (as measures of outcomes) are aligned with the curriculum and instruction (the educational inputs), they will more likely be measures of classroom learning. When the content of a high-stakes test reflects actual classroom instruction and the curriculum of an educational system, appropriate test use can help achieve educational excellence for all students. In addition, when tests provide a fair basis for making decisions regarding student graduation or promotion from an educational standpoint, the more likely they will pass legal scrutiny.

In the leading case on the subject, *Debra P. v. Turlington*,[2] the Fifth Circuit Court of Appeals ruled that a state proposing testing requirements as a condition of high school graduation was obligated to determine if the material being tested was actually being taught. The court found the test "was fundamentally unfair in that it may have covered matters that were not taught in the schools of the state."[3] Recently, the federal district court in *G.I. Forum v. Texas Education Agency*[4] reaffirmed the notion that there must be more than theoretical coverage of the curriculum on such tests. In that case, the court partially based its ruling in favor of the State of Texas on the evidence showing that "the [challenged] test measures what it purports to measure . . . [and] all students in Texas have had a reasonable opportunity to learn the subject matters covered by the exam."[5]

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[2] 644 F.2d 397 (5th Cir. 1981).

[3] *Id.* at 403.

This alignment issue (which is, ultimately, an opportunity to learn issue) is decidedly more complex for students who are not fully proficient in English or who have disabilities. A related yet distinct set of accommodations and alternative testing issues surface as high-stakes testing includes these students.

For students who are not fully proficient in English (often referred to as English language learners or limited English proficient students), educators must ensure that assessment practices mesh with the instructional programs designed to (1) address the students' language abilities *and* (2) allow for content mastery. In short, the way in which these students are assessed for high-stakes purposes cannot be divorced from the overall theory of the educational program provided: symmetry between the educational program (whether it is some form of bilingual instruction or immersion, for instance) and the corresponding testing practices must exist.

Similarly, disabled students who, under federal law, should be educated pursuant to an individualized educational program, must be assessed in a way that is consistent with that program. This means, at a minimum, that the high-stakes testing practices (and the drive toward inclusion of all students in statewide and district-wide programs) cannot be imposed without regard to the terms of these individualized programs and the particular needs of the students individually. See K. Mehfoud, *Special Considerations in High-Stakes Testing, infra*, at 4-1 for more discussion of testing disabled students.)

When establishing high-stakes consequences for students, the issue of notice about the policy changes that will have significant consequences for students is paramount. One federal court has observed: "No one could seriously contend that academic requirements could never be changed during the twelve years a child typically spends in school. It is also obvious that [high-stakes test] requirement[s] could not . . . be[] constitutionally imposed a day prior to graduation. Such late notice could serve no academic purpose."[6] The timing between the establishment of educational objectives related to student advancement and the actual imposition of high-stakes consequences attached to student performance (frequently based on test scores) is important. Clearly, there's a relationship between the notice provided and the kind of opportunity that students have had to master the material or skills tested. Once again, the central legal (and educational) inquiry regarding the students' opportunity to learn drives the analysis. (See R.C. Wood, *Due Process and Discrimination Issues, infra,* at 3-1 for more discussion of due process issues.)

How are new test requirements implemented and interpreted to ensure appropriate educational decision making?

A series of protections may be integrated into the administration of a test and the interpretation of test scores to help eliminate the risk of inappropriately denying (or conferring) educational opportunities to students based on test scores. Those steps include: (1) establishing compensatory or tutorial supports to ensure that all students have the same basic and fair opportunity to master the material tested; (2) providing multiple opportunities to take the test; (3) considering academic factors in addition to the test scores that may affirm or challenge the high-stakes conclusions derived from the test score alone; and (4) using appropriate accommodations to meet the needs of disabled or limited English proficient students.

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[4] 87 F. Supp.2d 667 (W.D. Tex 2000).

[5] *Id.* at 681-82.

[6] Anderson v. Banks, 520 F. Supp. 472, 506 (S.D. Ga. 1981).

These are all highly contextual practices that inform in very real terms the ultimate fairness of any test instrument. These kinds of protections are premised in part on a recognition that tests are not perfect barometers of learning, and similarly, that conclusions based on those results are not error-free. Given the inevitable presence of the human element in teaching and in learning, there is no guarantee that each student will have received all of the instruction necessary to provide a fair chance for success on high-stakes tests, even where there is alignment among standards, curriculum, instruction and high-stakes tests. Nor is there any foundation upon which one could reasonably conclude that all students can demonstrate what they have learned and what they know equally well on standarized tests. The principles of psychometrics in education recognize these points. Simply, there is no magic to any particular test score. Therefore, there should be ample protections in place to ensure that students are not inappropriately denied meaningful educational opportunities as a result of performance during a single test administration.

What evidence exists regarding the adverse impact of the high-stakes decision making upon discrete groups of students? What history and continuing effects of racial segregation or discrimination exist in the state or school district in question?

The perfect test is not, and cannot be, the enemy of the good test when evaluating and implementing testing practices. Nonetheless, psychometrically sound testing practices and conclusions must guide the development, administration and use of tests designed to further high-standards learning. The evaluation of test results is necessarily a dynamic one: test results can change over time based on a range of factors that may affect those results, such as teaching practices, methods of test administration, and student limitations and needs. As a result, careful monitoring of test inputs and outcomes over time is critical. Importantly, educators should regularly monitor test results to determine if there are significant disparities among student groups, based on race, national origin, gender or disability. Psychometrically and legally, the presence of such disparities should lead to further investigation so that any potential bias or discrimination in the test use can be eliminated.

Similarly, a state's or district's history of *de jure* segregation is central in any determination regarding the imposition of new high-stakes criteria. Such test instruments have the potential to perpetuate (rather than eliminate) continuing effects of past discrimination. One court, in this context, has noted that the otherwise legitimate aim of improving educational standards cannot be viewed in isolation when a school district has a *de jure* history and a subsequent policy of student tracking that perpetuated the segregation. The point is this: If a school system denied full and equal opportunity to a particular group of children by not providing them a level of instruction that ensures a meaningful opportunity to succeed, then the efforts to implement high-stakes measures with impact on individual students must not perpetuate the vestiges of that prior discrimination.

CONCLUSION

As the cases involving discrimination and "unfairness" claims reveal, the educational interest is at the heart of the examination of whether tests are being used in legally appropriate ways. This legal and educational alignment suggests, therefore, a basic foundation for concluding that the promotion of excellence in education can be and should be fully consistent with the promotion of equity and fairness in education. In short, it may be useful to think about the fundamental point of this discussion in very simple (albeit deceptively simple) terms. One court has noted: "An invalid test cannot measure merit."

The relative simplicity of the framework proposed in this article does not suggest that the issues to be addressed are simple or easy. The challenges facing educators struggling to improve the quality of their schools and student performance are many and complex. How can we improve the quality of teaching to better prepare our students for a new century? How can we ensure that schools facing some of the most significant challenges have the necessary resources to help all students achieve to high standards? One step in the right direction is to move beyond the frequently polarizing rhetoric to address the real issues educators face and to identify frameworks and strategies that can be pursued to accomplish the twin educational aims of high standards and fairness.

High standards for academic achievement, when coupled with instruction and support that help students reach those standards—as determined by valid and reliable assessments—can unite students, parents, teachers, administrators and community residents around the shared goal of improving student performance for all. By defining what students should know and be able to do, standards keep schools focused on the desired results for students—and can stimulate local development of appropriate curricula and application of effective teaching strategies to make these results possible and challenge students to learn. Standards also indicate what assessments must measure in order to show achievement.

Although the questions that arise about standards and equity will be as different as the students served by our public schools, a fundamental point should not be lost: all students need an educational system that expects high performance and that offers real and meaningful educational opportunities. As U.S. Education Secretary Riley has often said, "All students have the right to a high quality, high standards education. Nothing less will do."

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1680 Duke Street, Alexandria, VA 22314.
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Mr. Coleman is an attorney at Nixon Peabody, LLP, in Washington, D.C. where he provides legal and policy advice to states and school districts regarding the design and implementation of standards-based reforms. He previously served as Deputy Assistant Secretary, U.S. Department of Education, Office for Civil Rights. He may be reached at acoleman@nixonpeabody.com.

Providing Services to the Youngest Children with Disabilities under Part B and Part C of the IDEA: Who Gets What?

Mary Jane K. Rapport, Ph.D., PT

Education Law Association
46th Annual Conference
November 8-11, 2000
Atlanta, Georgia

Providing Services to the Youngest Children with Disabilities Under Part B and Part C of the IDEA: Who Gets What?

Education Law Association
46th Annual Conference
Atlanta, GA
November 10, 2000

Presenter: Mary Jane K. Rapport, PhD, PT
Email: Rapport.MaryJane@tchden.org
Phone: 303-864-5166

I. Purpose of IDEA

A. Part B, Section 619 of the Individuals with Disabilities Education Act – Preschool Grants for Children with Disabilities

34 C.F.R. §301.1

The purpose of the Preschool Grants for Children With Disabilities program (Preschool Grants program) is to provide grants to states to assist them in providing special education and related services---

(a) To children with disabilities aged 3 through 5 years; and

(b) At a State's discretion, to two-year-old children with disabilities who will turn three during the school year.

Authority: 20 U.S.C. 1419(a)

B. Part C of the Individuals with Disabilities Education Act – Early intervention program for infants and toddlers with disabilities

34 C.F.R. §303.1

The purpose of this part is to provide financial assistance to States to---

(a) Maintain and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(b) Facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage);

(c) Enhance the States' capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families; and

(d) Enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of historically underrepresented populations, particularly minority, low-income, inner- city, and rural populations.

Authority: 20 U.S.C. 1431

II. Eligibility

A. Part B - Definition of a child (age 3-21 years) with a disability

34C.F.R. §300.7

(a) General definition---

(1) The term 'child with a disability' means a child who has been evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who needs special education and related services.

(2) (i) If it is determined through an appropriate evaluation that a child has one of the identified disabilities but only needs a related service and not special education, the child is not eligible as a child with a disability under part B.

(ii) If the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability and eligible under part B.

(b) Children aged 3 through 9 experiencing developmental delays.

The term 'child with a disability' for children aged 3 through 9 may include a child---

(1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas:

- physical development
- cognitive development
- communication development
- social or emotional development
- adaptive development

(2) Who, by reason thereof, needs special education and related services.

Authority: 20 U.S.C. 1412(a)(6), 1414(b)(4)

Note: Children ages 3-5 (preschool age) with a disability, as described in 34C.F.R. §300.7, are eligible for special education and related services under Part B, IDEA.

B. Part C - Definition of infants and toddlers with disabilities

34 C.F.R. §303.16

(a) As used in this part, infants and toddlers with disabilities means individuals from birth through age two who need early intervention services because they—

(1) Are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas:

(i) Cognitive development

(ii) Physical development, including vision and hearing

(iii) Communication development

(iv) Social or emotional development

(v) Adaptive development; or

(2) Have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

(b) The term may also include, at a State's discretion, children from birth through age two who are at risk of having substantial developmental delays if early intervention services are not provided.

Authority: 20 U.S.C. 1432(5)

III. Identification

A. Part B - Child Find Requirements

34 C.F.R. §300.125

(a) General requirements

(1) The State must have in effect policies and procedures to ensure that---

(i) All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated;

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(2) The requirements on the State for child find apply to---

(i) Highly mobile children with disabilities (such as migrant and homeless children); and

(ii) Children who are suspected of being a child with a disability under Part B and are in need of special education, even though they are advancing from grade to grade.

(c) Child find for children from birth through age 2 when the SEA and lead agency for the Part C program are different

(1) In States where the SEA and the State's lead agency for the Part C program are different and the Part C lead agency will be participating in the child find activities, a description of the nature and extent of the Part C lead agency's participation must be included.

(2) With the SEA's agreement, the Part C lead agency's participation may include the actual implementation of child find activities for infants and toddlers with disabilities.

(3) The use of an interagency agreement or other mechanism for providing for the Part C lead agency's participation does not alter or diminish the responsibility of the SEA to ensure compliance with the requirements for child find.

Authority: 20 U.S.C. 1412 (a)(3)(A) and (B)

B. Part C - Child Find Requirements

34 C.F.R. §303.321

(a) General requirements—

(1) A comprehensive child find system that is consistent with part B of the Act

(2) The lead agency shall be responsible for implementing the child find system.

(b) Procedures. The child find system must include the policies and procedures that the State will follow to ensure that---

(1) All infants and toddlers in the State who are eligible for services under this part are identified, located, and evaluated; and

(2) An effective method is developed and implemented to determine which children are receiving needed early intervention services.

(c) Coordination. The lead agency shall ensure that the child find system is coordinated with all other major efforts to locate and identify children conducted by other State agencies responsible for administering education, health, and social service programs relevant to this population, tribes and tribal organizations that receive payments under this part, and other tribes and tribal organizations as appropriate, including efforts in the---

(1) Program authorized under part B of the Act;

(2) Maternal and Child Health program under title V of the Social Security Act;

(3) Early Periodic Screening, Diagnosis and Treatment (EPSDT) program under title XIX of the Social Security Act;

(4) Developmental Disabilities Assistance and Bill of Rights Act;

(5) Head Start Act; and

(6) Supplemental Security Income program under title XVI of the Social Security Act.

Authority: 20 U.S.C. 1432(4)(E)(vii), 1435(a)(5)

IV. Evaluation and assessment

A. Part B - Evaluation requirements and procedures

1. Evaluation requirement

34 C.F.R. §300.531

Each public agency shall conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability under Part B of the Act.
Authority: 20 U.S.C. 1414(a)(I)

2. Evaluation procedures

34 C.F.R. §300.532

At a minimum, that the following requirements are to be met:

(a) Tests and evaluation materials

  (1) Tests and other evaluation materials---

    (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

    (ii) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

  (2) Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.

(b) A variety of assessment tools and strategies are used to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum **(or for a preschool child, to participate in appropriate activities)**, that may assist in determining---

  (1) Whether the child is a child with a disability under Part B; and

  (2) The content of the child's IEP.

(c) Standardized tests

  (1) Any standardized tests that are given to a child---(i) Have been validated for the specific purpose for which they are used; and (ii) Are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests.

  (2) If an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test, or the method of test administration) must be included in the evaluation report.

(d) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(e) Tests are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(f) No single procedure is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.

(g) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(h) In evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(i) Use of technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(j) Use of assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

Authority: 20 U.S.C. 1412(a)(6)(B), 1414(b)(2) and (3)

B. Part C - Evaluation and assessment

34 C.F.R. §303.322

(a) General requirements

  (1) Each system must include the performance of a timely, comprehensive, multidisciplinary evaluation of each child, birth through age two, referred for evaluation, and a family-directed identification of the needs of each child's family to appropriately assist in the development of the child.

  (2) The lead agency is responsible for ensuring that the evaluation requirements are implemented.

(b) Definitions of evaluation and assessment. As used in this part---

  (1) Evaluation means the procedures used by appropriate qualified personnel to determine a child's initial and continuing eligibility, including determining the status of the child in each of the developmental areas.

  (2) Assessment means the ongoing procedures used by appropriate qualified personnel to identify---

    (i) The child's unique strengths and needs and the services appropriate to meet those needs;

    (ii) The resources, priorities, and concerns of the family and the supports and services necessary to enhance the family's capacity to meet the developmental needs of their infant or toddler with a disability.

(c) Evaluation and assessment of the child. The evaluation and assessment of each child must---

  (1) Be conducted by personnel trained to utilize appropriate methods and procedures;

  (2) Be based on informed clinical opinion; and

  (3) Include the following:

    (i) A review of pertinent records related to the child's current health status and medical history.

(ii) An evaluation of the child's level of functioning in each of the following developmental areas:

- Cognitive development.
- Physical development, including vision and hearing.
- Communication development
- Social or emotional development
- Adaptive development

(iii) An assessment of the unique needs of the child in terms of each of the developmental areas, including the identification of services appropriate to meet those needs.

(d) Family assessment

(1) Family assessments must be family-directed and designed to determine the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the child.

(2) Any assessment that is conducted must be voluntary on the part of the family.

(3) If an assessment of the family is carried out, the assessment must---

(i) Be conducted by personnel trained to utilize appropriate methods and procedures;

(ii) Be based on information provided by the family through a personal interview; and

(iii) Incorporate the family's description of its resources, priorities, and concerns related to enhancing the child's development.

(e) Timelines

(1) The evaluation and initial assessment of each child (including the family assessment) must be completed within the 45-day time period.

(2) The lead agency is responsible for the development of procedures to ensure that in the event of exceptional circumstances that make it impossible to complete the evaluation and assessment within 45 days (e.g., if a child is ill), public agencies will-- (i) Document those circumstances; and (ii) Develop and implement an interim IFSP.

Authority: 20 U.S.C. 1435(a)(3); 1436 (a)(1), (a)(2), (d)(1), and (d)(2)

V. Services and Placement

A. Part B - Services

1. Definition of Free appropriate public education (FAPE)

34 C.F.R. §300.13

As used in this part, the term free appropriate public education means special education and related services that---

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include **preschool**, elementary school, or secondary school education in the State; and

(d) Are provided in conformity with an individualized education program (IEP).

Authority: 20 U.S.C. 1401(8)

Note: *See* 34 C.F.R. §300.24 and C.F.R. §300.26 for definitions of related services and special education

2. Requirements of States with existing programs for children age 3-5 years

34 C.F.R. §300.300

(b) Exception for age ranges 3-5 (and 18-21)

- (1) If State law or a court order requires the State to provide education for children age 3-5 years in any disability category, the State must make FAPE available to all children age 3-5 years who have that disability.
- (2) If a public agency provides education to nondisabled children age 3-5 years, it must make FAPE available to at least a proportionate number of children with disabilities age 3-5 years.

Authority: 20 U.S.C. 1412(a)(1), 1411(i)(1)(C), S. Rep. No. 94-168, p. 19 (1975)

3. Least restrictive environments

34 C.F.R. §300.550

(b) Each public agency shall ensure-

- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and
- (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Authority: 20 U.S.C. 1412(a)(5)

4. Alternative placements

34 C.F.R. §300.551

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

Authority: 20 U.S.C. 1412(a)(5)

B. Part C - Early Intervention Programs and Services

1. Early Intervention Services

34 C.F.R. §303.12

(a) General. As used in this part, early intervention services means services that---

- (1) Are designed to meet the developmental needs of each child eligible under this part and the needs of the family related to enhancing the child's development;
- (2) Are selected in collaboration with the parents;

- (3) Are provided---
  - (i) Under public supervision;
  - (ii) By qualified personnel;
  - (iii) In conformity with an individualized family service plan; and
  - (iv) At no cost, unless, subject to Sec. 303.520(b)(3), Federal or State law provides for a system of payments by families, including a schedule of sliding fees; and
- (4) Meet the standards of the State, including the requirements of this part.

(b) Natural environments

To the maximum extent appropriate to the needs of the child, early intervention services must be provided in natural environments, including the home and community settings in which children without disabilities participate.

(c) General role of service providers. Service providers are responsible for---

- (1) Consulting with parents, other service providers, and representatives of appropriate community agencies to ensure the effective provision of services in that area;
- (2) Training parents and others regarding the provision of those services; and
- (3) Participating in the multidisciplinary team's assessment of a child and the child's family, and in the development of integrated goals and outcomes for the individualized family service plan.

(d) Types of services included under "early intervention services"

- (1) Assistive technology
- (2) Audiology
- (3) Family training, counseling, and home visits
- (4) Health services, including such services as clean intermittent catheterization, tracheostomy care, tube feeding, the changing of dressings or colostomy collection bags. (Does not include surgical services or services purely medical in nature, refer to §303.13)
- (5) Medical services only for diagnostic or evaluation purposes--services provided by a licensed physician to determine a child's developmental status and need for early intervention services
- (6) Nursing services
- (7) Nutrition services
- (8) Occupational therapy
- (9) Physical therapy
- (10) Psychological services
- (11) Service coordination
- (12) Social work services
- (13) Special instruction
- (14) Speech-language pathology

(15) Transportation and related costs

(16) Vision services

Authority: 20 U.S.C. 1401(1) and (2); 1432(4)

2. Additional information about natural environments

(a) Definition of natural environments

34 C.F.R. §303.18

As used in this part, natural environments means settings that are natural or normal for the child's age peers who have no disabilities.

Authority: 20 U.S.C. 1435 and 1436

VI. Service Delivery

A. Part B - Service delivery based on Individualized Education Program (IEP)

34 C.F.R. §300.347

(a) General requirements. The IEP for each child with a disability must include-

(1) A statement of the child's present levels of educational performance, including ---

(i) How the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children); or

(ii) **For preschool children**, as appropriate, how the disability affects the child's participation in appropriate activities;

(2) A statement of measurable annual goals, including benchmarks or short-term objectives, related to ---

(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children), or for **preschool children**, as appropriate, to participate in appropriate activities; and

(ii) Meeting each of the child's other educational needs that result from the child's disability;

(3) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child---

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in extracurricular and other nonacademic activities;

(5) Participation in assessments

(i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and

(ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of ---(A) Why that assessment is not appropriate for the child; and (B) How the child will be assessed;

(6) The projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications; and

(7) A statement of --- (i) How the child's progress toward the annual goals will be measured; and (ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of ---

(A) Their child's progress toward the annual goals; and

(B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

B. Part C - Service delivery based on an Individualized Family Service Plan (IFSP)

1. General information about an IFSP

34 C.F.R. §303.340

(a) Each system must include policies and procedures regarding individualized family service plans.

(b) As used in this part, individualized family service plan and IFSP mean a written plan for providing early intervention services to a child eligible under this part and the child's family. The plan must—

(1) Be developed in accordance with procedures outlined in the regulations;

(2) Be based on evaluation and assessment, and

(3) Include the matters regarding the child's status, family information, and expected outcomes.

(c) Lead agency responsibility. The lead agency shall ensure that an IFSP is developed and implemented for each eligible child, in accordance with the requirements of this part. If there is a dispute between agencies as to who has responsibility for developing or implementing an IFSP, the lead agency shall resolve the dispute or assign responsibility.

Authority: 20 U.S.C. 1436

2. Content of an IFSP

34 C.F.R. §303.344

(a) Information about the child's status.

(b) Family information.

(c) Outcomes. The IFSP must include a statement of the major outcomes expected to be achieved for the child and family.

(d) Early intervention services. The IFSP must include a statement of the specific early intervention services necessary to meet the unique needs of the child and the family to achieve the identified outcomes including---

(1) The frequency, intensity, and method of delivering the services;

(2) The natural environments in which early intervention services will be provided, and a justification of the extent, if any, to which the services will not be provided in a natural environment;

(3) The location of the services; and

(4) The payment arrangements, if any.

(e) Other services.

(1) To the extent appropriate, the IFSP must include-- (i) Medical and other services that the child needs, but that are not required under this part; and (ii) The funding sources to be used in paying for those services or the steps that will be taken to secure those services through public or private sources.

(2) There is no requirement for medical services (e.g., immunizations and "well-baby" care), unless a child needs those services and the services are not otherwise available or being provided.

(f) Dates; duration of services. The IFSP must include—

(1) The projected dates for initiation of the services in paragraph (d)(1) of this section as soon as possible after the IFSP meetings described in Sec. 303.342; and

(2) The anticipated duration of those services.

(g) Service coordinator.

(1) The IFSP must include the name of the service coordinator from the profession most immediately relevant to the child's or family's needs (or who is otherwise qualified to carry out all applicable responsibilities under this part), who will be responsible for the implementation of the IFSP and coordination with other agencies and persons.

(2) The public agency may-- (i) Assign the same service coordinator who was appointed at the time that the child was initially referred for evaluation to be responsible for implementing a child's and family's IFSP; or (ii) Appoint a new service coordinator.

(h) Transition from Part C services.

(1) The IFSP must include the steps to be taken to support the transition of the child, in accordance with Sec. 303.148, to-- (i) Preschool services under Part B of the Act, to the extent that those services are appropriate; or (ii) Other services that may be available, if appropriate.

(2) The steps required in paragraph (h)(1) of this section include---

(i) Discussions with, and training of, parents regarding future placements and other matters related to the child's transition;

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(ii) Procedures to prepare the child for changes in service delivery, including steps to help the child adjust to, and function in, a new setting; and

(iii) With parental consent, the transmission of information about the child to the local educational agency, to ensure continuity of services, including evaluation and assessment information, and copies of IFSPs.

Authority: 20 U.S.C. 1436(d)

C. Special provisions for children age 3-5

34 C.F.R. §300.342(c)

(1) In the case of a child with a disability aged 3 through 5 (or, at the discretion of the SEA a 2-year-old child with a disability who will turn age 3 during the school year), an IFSP may serve as the IEP of the child if using that plan as the IEP is--

(i) Consistent with State policy; and

(ii) Agreed to by the agency and the child's parents.

(2) In implementing the requirements the use of an IFSP as an IEP (as described in (c)(1)), the public agency shall-

(i) Provide to the child's parents a detailed explanation of the differences between an IFSP and an IEP;

(ii) If the parents choose an IFSP, obtain written informed consent from the parents.

Authority: 20 U.S.C. 1414(d)(2)(A) and (B), Pub. L. 105-17, sec. 201(a)(2)(A), (C)

This handout was prepared with assistance from Kelly Stainback Tracy, PT, MPH, MCH Fellow at JFK Partners, University of Colorado Health Sciences Center.

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A Quick Overview of IDEA Regulations for the Youngest Children with Special Needs

	Part B	**Part C**
Eligibility	**34 C.F.R. §300.7** Age 3-21: Disability and need for special education and related services Age 3-9: Developmental delay and need for special eduacation and related services	**34 C.F.R. §303.16** Birth through age two: Experiencing developmental delays or a condition with a high probability of resulting in developmental delay -OR- At State's discretion, at risk of developmental delay
Identification	**34 C.F.R. §300.125** Comprehensive system to identify, locate, and evaluate eligible children	**34 C.F.R. §303.321** Comprehensive system to identify, locate, and evaluate eligible children
Evaluation	**34 C.F.R. §§300.530-300.536** Use of a variety of non-discrimantory evaluation or assessment tools and/or standardized tests Evaluate all areas related to the suspected disability and identify all special education and related service needs Evaluation must be completed before provision of services	**34 C.F.R. §§303.322-303.323** A timely, comprehensive, multidisciplinary evaluation to determine initial and continuing eligibility Family-directed identification of needs to enhance the family's capacity to meet the developmental needs of the child Must be completed with 45 days; an interim IFSP can be developed if exceptional circumstances delay completion of evaluation
Placement	**34 C.F.R. §300.550** Special education and related services in the least restrictive environment	**34 C.F.R. §303.12(b)** Early intervention services in natural environments
Services	**34 C.F.R. §300.13** Free and appropriate public education to children with disabilities through the provision of special education and related services	**34 C.F.R. §303.12** Early intervention services to eligible children
Service Delivery	**34 C.F.R. §§300.340-300.350** Based on an Individualized Education Program to meet the needs of the child Includes: present levels of performance; measurable annual goals; special education and related services; supplementary aids and services; and modifications or supports for school personnel	**34 C.F.R. §§303.340-303.346** Based on an Individidal Family Service Plan to meet the needs of the child and child's family Includes: child's status; family information; expected outcomes; and the specific early intervention services Must include the name of a service coordinator who will be responsible for the implementation of the IFSP and coordination with other agencies and persons

ATTACHMENT 1 —LIST OF PROPOSED CHANGES IN IDEA-PART C REGULATIONS

[Note: Attachment 1 will not be codified in the Code of Federal Regulations]

Sect. No.	Current Title	Changes [1]
SUBPART A—GENERAL		
303.3	Activities that may be supported under this part.	(1) Change title to "Use of Part C funds;" and restructure the section to change pghs "(a)-(e)" to "(a)(1)-(a)(5)." (2) Add a new pgh (a)(6)--Assist families to understand sources of financing early intervention services, including public and private insurance programs... (3) Add a new pgh (b)(1) to clarify that Part C funds may not be used to pay costs of an action or proceeding under sec. 639 of the Act or subpart E of this part. (4) Add a new pgh (b)(2)--Re pgh (b)(1) does not preclude using Part C funds for conducting due process hearings (e.g., paying a hearing officer, and the cost of providing the parent a transcription of the hearing).
303.5	Applicable regulations.	(1) Amend pgh (a)(1) by adding references to other EDGAR regulations that apply (i.e., Parts 97-99). (2) Amend references to Part B Regs in pgh (a)(3), by -- (A) adding a reference to Part B due process hearing procedures in §§300.506-300.512; and (B) changing the citation for Department procedures from §§300.580-300.585 to §§300.580-300.587. (3) Delete pgh (b)(4) (citations are not applicable). (4) Renumber pgh (b)(5) as (b)(4); and correct the citation to read §303.127 ("Confidentiality. . ."). (5) Revise authority cite to include 20 U.S.C. 1442.
Definitions		
--	"Note" preceding §303.6--List of terms defined in specific subparts.	◆ Delete "Location (§303.344(d)(3))" from the list of terms. (See changes to §303.344(d).)
303.9	Days (Definition).	(1) Change title to "Day; business day;" and state that "day" means calendar day, except for hearing rights in §300.509 of the Part B regulations (if a State, under §303.420(a)(1), adopts the Part B due process hearing procedures). (2) Define "business day" as Monday-Friday, except for Federal and State holidays.
303.10	Developmental delay.	◆ Replace "an individual" with "a child."

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[1] This table includes all substantive and technical changes that are proposed in this NPRM, including changes that are made to provide clarity and guidance. However, the table generally does not include simple word changes (e.g., in §303.125, deleting "such;" replacing "assure" with "ensure," or correcting typographical errors.

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Sect. No.	Current Title	Changes [1]
303.12	Early intervention services (EIS) (Definition).	(1) Change the order of items in pgh (a) to conform more closely to the Act; and further revise "(a)" to clarify that the term "EIS" means "developmental" services. (2) Delete pgh (b) (on natural environments), and move text to §303.18; move pgh (d) (Definitions of individual services) to pgh (b), and change introduction. (3) Clarify, in proposed pgh (a)(5), that the early intervention services listed in pgh (b) are subject to the exclusions on "health services" in §303.13(c). (4) Move pgh (c) (General role of service providers) to pgh (d) (5) Move pgh (e) (Qualified personnel) to pgh (c), and change the introduction.
303.12(d)(1)	Assistive technology (AT) (AT device & AT service). (Definitions under "EIS")	(1) Divide introduction into proposed pghs "(b)(1)(i)" for AT device, and "(b)(1)(ii)" for AT service, etc. (2) Revise AT service to clarify that the service directly Assists an eligible child and the child's parent in the Selection, acquisition, or use of an AT device for the Child.
303.12(d)(2)	Audiology (Definition under EIS).	(1) Change title to "Audiology services," as in the Act. (2) Replace "auditory impairment" with "hearing Loss," and add "Counseling & guidance of Children...," as in Part B.
303.12.(d)(3)	Family training, counseling, & home visits. (Definition under EIS)	◆ Add – "special educators" to the list of EIS providers under the definition.
303.12(d)(6)	Nursing services (Definition under EIS)	◆ Move from "EIS" to "health services" (§303.13), and renumber the remaining services under EIS.
303.12(d)(8)	Occupational therapy (OT). (Definition under EIS)	(1) Renumber as pgh (b)(7). (2) Add, after "OT," "(i) Means services provided by a qualified occupational therapist, and (ii) Includes..."
303.12(d)(11)	Service coordination services. (Definition under EIS)	(1) Renumber as pgh (b)(10), and change title to "Service coordination." (2) Revise text by striking the phrase, "that are in addition to the functions and activities included under §303.23," and replacing it with "in accordance with §303.302."
303.12(d)(13)	Special instruction (Definition under EIS)	(1) Renumber as pgh (b)(12), and revise (b)(12)(i) by replacing "in a variety of developmental areas..." with a listing of all 5 developmental areas from the Act. (2) Revise pgh (a)(13)(ii), to provide clarifying language regarding "Planning that leads to achieving the outcomes in the child's IFSP..."

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Sect. No.	Current Title	Changes [1]
303.12(d)(14)	Speech-language pathology (Definition under EIS).	(1) Renumber as pgh (b)(13), and add "services" to title, to conform to statute. (2) Replace "oropharyngeal" with "swallowing;" and (3) Add a new pgh (b)(13)(iv) Re -- "Counseling and Guidance of parents..."
--	Note following §303.12.	◆ Clarify that "qualified personnel" who provide EIS may include augmentative communication specialists and technology specialists.
303.13	Health Services.	(1) Add "Nursing services" (from §303.12(d)(6)) to the list of covered "health services" under §303.13 (b) (i.e., new pgh (b)(3)). (2) Add additional examples of services and devices not covered under "Health services" (§303.13(c)), as follows: ◆ To "services that are surgical in nature," add "the installation of devices such as pacemakers, cochlear implants, or prostheses." ◆ To "Devices necessary to control or treat a medical condition," add "or other condition (such as., pacemakers, cochlear implants, prostheses, or shunts)."
303.14	IFSP.	(1) Change title to "IFSP; IFSP team." (2) Designate "IFSP" definition as pgh (a), and change citation from §303.340(b) to "§303.340(a)." (3) Define "IFSP team" (in pgh (b)) as "the group of participants described in §303.343 that is responsible for..." developing, reviewing, and revising the IFSP.
303.18	Natural environments.	◆ Change §303.18 to "§303.18(a);" and add language on natural environments from §303.12(b) as proposed §303.18(b).
303.19	Parent.	◆ In pgh (a)(2), after "A guardian," add ", but not the State if the child is a ward of the State." (This was inadvertenly omitted in 1998-99 Regs)
303.22	Qualified.	◆ Change title to "Qualified personnel," and conform to Part B defitition.
303.23	Service coordination (case management).	◆ Move text of definition to new §303.302; delete definition in §303.23; and renumber remaining sections in Subpart A.

Sect. No.	Current Title	Changes [1]
SUBPART B–STATE APPLICATION FOR A GRANT		
303.100	Conditions of assistance.	(1) Revise pgh (a) for clarity; move pgh "(c)" to "(a)(1)," and change pgh "(d)" to "(c);" add headings to pghs (a)-(c); and make other technical changes. (2) Further revise pgh (a) to clarify that each application must contain – (A) The required information in subpart B; and "(B) Copies of all applicable State statutes, regulations, and other State documents that show the basis of that information."
303.123	Prohibition against commingling.	◆ Incorporate the substance of the note into the text following §303.123, and delete the note.
303.124	Prohibition against supplanting.	◆ Add a new pgh (c) to clarify that, for purposes of pgh (b), a State, in any FY, must spend at least the same amount for EI services that it spent the previous year.
303.128	Traditionally underserved groups.	◆ Add "inner-city" to the list of groups in paragraph (a).
303.148	Transition to preschool programs.	(1) Change title to "Transition to preschool or other appropriate services." (2) Re-structure section for clarity and completeness, including adding headings to each pgh. (3) Add a new pgh (c) (Transmittal of records; parental consent), by including the provisions from §303.344(h) (now "(i)"). (But clarify that consent is not required for directory information to LEA for Part B child find.)
303.161	State definition of developmental delay.	◆ Clarify that each application must contain the State's definition of developmental delay "as required in 303.300(b)."
303.167	Individualized family service plans. (Re—policies & procedures)	(1) Amend pgh (b) to include "§§303.340-303.343" in the list of applicable sections (i.e., to add new §303.341). (2) Amend pgh (c) (on natural environments) by – (1) moving the substance to a new §303.341(a); and (2) revising the language to state that each application must include "Policies and procedures on natural environments that meet the requirements of §§303.341 and 303.344(d)(3)."

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Sect. No.	Current Title	Changes [1]
SUBPART D—COMPONENTS OF A STATEWIDE SYSTEM		
303.300	State eligibility criteria and procedures.	(1) Change title to "Child eligibility--criteria and procedures;" and add pgh headings (General; State definition of developmental delay; Diagnosed condition; and Children who are at risk). (2) Revise pgh (a), to clarify that the eligibility criteria must -- (A) meet the requirements in §303.300(b)-(d); and (B) be on file in the State, and available for public review.
303.301	Central directory.	◆ Amend pgh (a)(3) to add the substance of the note following §303.301 to clarify that "Professional and other groups" include "parent support groups & advocate associations;" and delete the note.
303.302	Service coordination. (New Section)	(1) Add the substance of §303.23 to new §303.302; and revise new pgh (a) to state that "Each system must ensure that service coordination is available..." (2) Make technical changes (e.g., delete "(case management)" from the title, and add headings to each pgh). (3) Incorporate the substance of notes 1 and 2 into the text of the regulations, as a new pgh (a)(2); and delete the notes. (4) Add a new pgh (b)(2) to clarify that service coordination is an on-going process designed to enhance service delivery, and, thus, is not required to be included as an EI service in a child's IFSP. (5) Add a new function of service coordinators, as pgh (d) (8), (i.e., At the discretion of the State, assisting families to understand sources of financing EI services, including public and private insurance programs, and how to access those sources...).
303.320	Public awareness program.	◆ Revise section by making technical changes, to more closely track the statute, and for clarity and improved readability.
303.321	Comprehensive child find system.	(1) In pgh (a), change the Part B child find citation from §300.128 to §300.125. (2) Revise pgh (b)(1) to clarify that the child find system includes children with disabilities from -- "(i) Traditionally underserved groups, including minority, low-income, inner-city, and rural families; and (ii) Highly mobile groups (such as migrant and homeless children)." (3) Revise the referral procedures in pgh (d)(2), as follows: ◆ Replace the 2-day timeline requirement in pgh (d)(2)(ii) with "as soon as reasonably possible." ◆ In pgh (d)(2)(iii), include a reference to lead agency responsibilities in §303.320(a)(2)(ii)(B)). (4) Revise the list of referral sources in pgh (d)(3), to: ◆ Add the qualification "if appropriate;" ◆ Add "and child care" between "Day care" and "programs," and ◆ Add "Other Federally funded programs such as Head start, Early Head Start, and Even Start."

Sect. No.	Current Title	Changes[1]
303.322	Evaluation and assessment	(1) Revise pgh (a)(1)(ii) to clarify that "A family directed identification of the needs of each child's family..." must meet the requirements of pgh (d) (Family assessment). (2) In pgh (b)(2)(ii), replace "their infant or toddler with a disability" with "the child."
Individualized Family Service Plans		
303.340	General.	(1) Change title to "Definition of IFSP; lead agency responsibility." (2) Add a new pgh (a) (Definition of IFSP); incorporate the substance of the current definition (from §303.340(b)), and revise the definition to specify (in pghs (a)(1) and (a)(3)) the role of the IFSP team in developing a child's IFSP. (3) Redesignate existing pgh (c) (Lead agency responsibility) as new pgh (b); (4) Redesignate existing pgh (a) (policies and procedures on IFSPs) as new pgh (b)(1); and replace "includes" with "has in effect."
303.341	Policies and procedures on natural environments. (New section)	(1) Add a new §303.341 (Policies and procedures on natural environments), as described in pghs (2)-(5), below: (2) Add a new pgh (a), by incorporating the substance of §303.167(c), to clarify that the provision of EI services in other than a natural environment occurs only if the IFSP team , based on the evaluation and assessment required in §303.322... determines that early intervention cannot be achieved satisfactorily for the child in a natural environment. (3) Add a new §303.341(b) to clarify that -- (A) the IFSP team must determine the natural environment for each service; and (B) if the team determines that a specific service must be provided in another environment, a justification must be included in the IFSP. (4) Add a new §303.341(c), to clarify that the justification in pgh (b) must -- (A) include the basis of the IFSP team's decision; (B) be based on the identified needs of the child and the projected outcomes; and (C) if appropriate, be based on the nature of the service required to meet the unique needs of the child. (5) Add a new §303.341(d), to clarify that the provisions on natural environments do not apply to services designed to meet the needs of a child's parents or other family members.
303.342	Procedures for IFSP development, review, and evaluation.	(1) Change title to "Development, review, and revision of IFSPs;" and add headings to pghs (a) , (a)(1), and (a)(2). (2) Add new pgh (a)(2) ("Consideration of special factors"), as adapted from Part B. (3) Make technical changes to pgh (b) (Periodic review) (i.e., making the last sentence in (b)(1) as new (b)(2), and changing existing pgh (b)(2), as (b)(3)). (4) Revise the second pgh of the note following §303.342 to add "or assessment" after "evaluation" procedures.

Sect. No.	Current Title	Changes [1]
303.343	Participants in IFSP meetings and periodic reviews.	(1) Change title to "IFSP team--meetings and periodic reviews. (2) Revise pgh (a)(2) to clarify how evaluations or assessments are interpreted if the person(s) conducting them is not at the IFSP meeting , i.e., "...steps must be taken to ensure-- (i) The person's involvement through other means (e.g., through participating in a telephone conference call); or (ii) That the results of the evaluations and assessments are appropriately interpreted at the meeting, by making pertinent records available at the meeting, and having a person attend the meeting who is qualified to interpret the evaluation and assessment results and their service implications (who may be one of the participants described in [§303.343(a)(1)]. "
303.344(a)	Content of IFSP--Information about child's status.	• Revise pgh (a)(2) to add "required" after "statement."
303.344(b)	Content of IFSP--Family information.	• Add a new pgh (b)(2), to specify that the statement on family information must be based on the family assessment required under §303.322(d).
303.344(c)	Content of IFSP—Outcomes.	(1) Add that outcomes must be "based on the evaluations and assessments required in 303.322(c) and (d)." (2) Change "timeliness" to "timelines."
303.344(d)	Content of IFSP—El services.	(1) Restructure pgh (d), and add headings (i.e., "Statement of services;" "Frequency, intensity, and method," "Natural environments—location of services;" and "Payment arrangements"). (2) Amend pgh (d) (1) to specify that the statement of El services must include the information required in §303.344(d)(2) through (d)(4). (3) Redesignate pgh (d)(1)(i) as proposed pgh (d)(2), and revise, to clarify that the IFSP must specify the frequency, intensity, and method of delivering each El service. (4) Replace pgh (d)(1)(ii) and (iii) with proposed pgh (d)(3), and revise to state – "In accordance with §303.341, the IFSP must-- (i) Specify the natural environments (locations or settings) where each El service will be provided; and (ii) Include a justification of the extent, if any, to which each service will not be provided in a natural environment." (5) Redesignate pgh (d)(1)(iv) as (d)(4) (Payment arrangements); and add an introductory clause (i.e., "The IFSP must include a statement of the payment arrangements, if any, for each early intervention service.")

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Sect. No.	Current Title	Changes [1]
303.344(e) (New)	Content of IFSP (Evaluations and assessments).	(1) Add a new §303.344(e), to specify that evaluations and assessments must be completed prior to, and in preparation for, conducting the IFSP meeting, and therefore, may not be listed as an early intervention service in the IFSP. (2) Renumber existing pghs "e, f, g, and h" as "f, g, h, and i."
303.344(h)	Content of IFSP—Transition from Part C services.	(1) Redesignate "§303.344(h)" as "§303.344(i)." (2) Move the substance of current pgh (h)(2)(iii) (Transmission of information about the child) to §303.148 (discussed earlier), and include a reference to §303.148(c) . (3) Add a new pgh (i)(2)(iii)(B) to include a reference to The conference on transition services required in §303.148(d). (4) Add a new pgh (i)(2)(iv) to clarify that the transition steps must include other activities that the IFSP team determines are necessary to support the transition of the child.
Personnel Training and Standards		
303.360	Comprehensive system of personnel development (CSPD).	♦ Restructure and add pgh headings for clarity and to improve the readability of the section
303.361	Personnel standards.	(1) Add pgh headings, for readability and to conform to Part B. (2) Add the substance of the note following 303.361, as new pghs (b)(2) and (b)(3) , and delete the note. (3) Add, from the Part B Regs, the substance of 34 CFR 300.136(b)(4) and (g)(2) to the corresponding pghs in §303.361, and otherwise conform this section to Part B personnel standards requirements.
SUBPART E—PROCEDURAL SAFEGUARDS		
303.401	Definitions of consent, native language, and personnally identifiable information.	♦ Add a new pgh (a)(3)(ii) Re—If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before it was revoked). This change conforms to Part B.
303.420	Due process procedures.	(1) Replace terms such as "individual child complaints" or "complaints" with "requests for due process hearings" or "due process hearings" throughout this section, and in §§303.402, and 303.421-303.425. (2) Add a new pgh (b) to provide that, if a parent initiates a hearing under §303.420(a)(1) or (a)(2), the lead agency must inform the parent of the availability of mediation described in §303.419. (3) Delete Note 1 following §303.420.
303.421	Appointment of an impartial person.	(1) Change title to "Impartial hearing officer;" and add new introductory language, Re – "Each lead agency shall ensure that any due process hearings...are conducted by an impartial hearing officer who..." (2) In pgh (a)(2), replace "complaint" with "dispute that is the subject of the hearing," and make structural changes.

Sect. No.	Current Title	Changes [1]
303.421	Appointment of an impartial person. (Continued)	(3) In pgh (b)(1), replace "the person appointed to implement the complaint resolution process" with "a person who serves as a hearing officer in accordance with this section."
303.422	Parent rights in administrative proceedings.	• Change title to "Parent rights in due process hearings;" and replace "administrative proceeding(s)" with " due process hearing" in the text.
303.423	Convenience of proceedings; timelines	(1) Amend title to replace "proceedings" with "hearings" (2) Add an introductory phrase ("Each lead agency must ensure that--"), and make other technical changes. (3) In pgh (a), replace the introductory clause with "Any due process hearing conducted under this part ..." (4) In Pgh (b), replace "complaint" or "complaint resolution process" with "due process hearing," etc; & make other technical changes.
303.424	Civil action.	• After "Any party aggrieved by the findings and decision," replace "regarding an administrative complaint" with "made under §303.420..."
303.425	Status of child during proceedings.	(1) In pgh (a), add "administrative or judicial" before "proceeding; " and replace "administrative complaint under this part" with "a request for a due process hearing under §303.420." (2) In pgh (b), replace "complaint" with "proceeding." (3) Add a new pgh (c) Re– "This section does not apply if a child is transitioning from EI services under this part to preschool services under Part B of the Act."
SUBPART F—STATE ADMINISTRATION		
303.501	Supervision and monitoring of programs.	• Change title of pgh (b) from "Methods of administering programs" to "Methods of ensuring compliance;" and make a similar change in the text.
Policies & Procedures Related to Financial Matters		
303.519 (New)	Policies related to payment for services.	(1) Add a new §303.519, by incorporating parts of existing §303.520, as follows: • Move existing §303.520(a) (Re-State policies on how EI services will be paid for) to new §303.519(a); and add new paragraphs regarding policy requirements (i.e., (a)(1)(i) for States with a system of payments, and (a)(1)(ii) for those without a system of payments). • Move current §303.520(c) (procedures to ensure timely provision of services) to new §303.519(b); but delete reference to a State's 5th year of participation. • Move current §303.520(d) (Proceeds from public and private insurance) to new §303.519(c); move (c)(2) to (c)(3) and revise to clarify that a State's use of private insurance (as with public insurance) is not considered State or local funds under the nonsupplanting requirements in §303.124. • Add new 303.520(c)(2) regarding use of fee income

Sect. No.	Current Title	Changes [1]
303.519 (New) (Continued)	Policies related to payment for services. (continued)	(2) Add new §303.519(d), governing the use of Part B funds for EI services to eligible children under Part C. (3) Add new §303.519(e) (Construction), from Part B Regulations.
303.520	Policies related to payment for services.	(1) Change title to "System of payments." (2) Add new §303.520(a)(1) to define "System of payments." (3) Add new §303.520(a)(2) Re – the lead agency is responsible for ensuring compliance with the system of payments. (4) Add new §303.520(b) to provide that a system of payments may have one or both types of fees (i.e., a system established under State law for EI services (e.g., sliding fee scales based on family income); or cost participation (e.g., co-pay or deductible amounts)). (5) Add new §303.520(c) to require (through §§303.520(d)(1) and 303.173) a State to submit an assurance that no fees will be charged in 3 circumstances (services at no cost, inability to pay, and FAPE and the use of Part B funds). (6) Add proposed §303.520(d), to specify requirements for State policies in States with a system of payments. (7) Add proposed §303.520(e), to specify procedural safeguards regarding payments by families.
303.521	Fees.	(1) Change the title to "Use of insurance." (2) Delete the entire text of current §303.521, and add new provisions under the following paragraphs: • (a)–Public insurance–no mandatory enrollment. • (b)–Use of public insurance. • (c)–Use of private insurance–States with a fee scale for early intervention services. • (d)–Use of private insurance—States with no system of payments • (e)–Use of Part C funds.
Other Changes to Subpart F		
303.523	Interagency agreements.	(1) Add the substance of the note following 303.523 to the text (Re—examples of how a State may ensure timely resolution of intra and interagency disputes); and delete the note. (2) Amend §303.523(a), to clarify that the lead agency must enter into agreements with other State-level agencies involved in the State's EI Program -- "whether by services or funding…" (3) Amend §303.523(d) (Additional components), to specify three topics (transition, policies on payment for services, and, at the discretion of the State, child find) to be included in interagency agreements.
SUBPART G—STATE INTERAGENCY COORDINATING COUNCIL		
303.600	Establishment of Council.	• Restructure pgh (c) for clarity.
303.653	Transitional services.	• Revise title to replace "transitional" with "transition;" replace "toddlers with disabilities" with "eligible children under this part;" and add "preschool" before "services under Part B…"

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Student Handbooks:

A Significant Legal Tool for the 21st Century

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Student Handbooks:
A Significant Legal Tool for the 21st Century

I. Introduction:

At one time, student handbooks were thought to be nothing more than an outlet for schools to express their policies and expectations. However, at some point in the not so distant past, these innocent expressions of policy became formal legal contracts, giving students and parents strong rights. Today, school districts and their attorneys must carefully craft student handbooks to clearly state the "law" of the school and to provide both students and parents with ample due process. Equally as important, school administrators and employees must take great care in following these policies, as any variation may lead to a costly and time-consuming lawsuit.

Last school year, the City of Decatur (Illinois) and the school community at-large saw how volatile and expensive student handbook litigation could become. In the *Decatur* case, six students were expelled and sued the District, in part, claiming violations of the student handbook. In particular, the students alleged that the handbook's gang-like activity policy was void for vagueness and the handbook's zero-tolerance policy did not pass constitutional muster. Additionally, the students claimed that school officials did not follow procedural due process set down by State law and reaffirmed in the student handbook. All of the students' claims were adjudicated in favor of the District.

However, Decatur's victory did not come by accident. It came through careful and thoughtful planning of its student handbook, the publication and dissemination of its policies to students and parents, and making sure that staff members were aware of the handbook procedures.

Unfortunately, there is no method to guarantee that a district's student handbook will be litigation proof. In fact, in this area of law there are very few reported cases that are directly on point and very little research to guide administrators or attorneys in the process. This paper will serve as a starting point by examining some of the key issues surrounding student handbooks. First, we will examine why schools need a student handbook and explore constitutional considerations with respect to preparation of the handbook. Next, we will provide an analysis of the relevant cases. Third, we will discuss the key elements that are required of, or should be included in, every student handbook. Lastly, we will offer some practical tips on handbook development and revision.

II. The Student Handbook and Constitutional Considerations

A. The Need for a Student Handbook

Perhaps foremost in importance is to restate the obvious: A school district needs to have a comprehensive student handbook. Not only do student handbooks provide a source of legal rights for students and parents, they also (if written properly) can provide essential information about the school and help insulate the district from liability.

While almost all schools have some version of a student handbook, not all schools take advantage of the benefits that a handbook can provide. First, a student handbook serves as a natural outlet for information that districts are required to provide parents and students under state and federal law. Second, handbooks are an excellent way of introducing the school to new parents and students and making sure that everyone is placed on notice as to the rules and expectations of the school and district.

As it is discussed in Section III, below, many lawsuits are brought for failure to put parents and students on notice as to rules and expectations of the school and district. As one can imagine, it is difficult, if not impossible, to defend a lawsuit where the complaining party is accused of violating unpublished and unknown rules. In fact, many schools have taken the proactive step of having parents and students sign a statement acknowledging that they have read the rules and policies of the school. Sign-off sheets were invaluable in the *Decatur* case, as it relieved the district from having to prove that the students were, at the very least, aware of the school rules.

B. Equal Protection and Policies Impacting Fundamental Rights

Public schools' policies are held to constitutional standards. This basis was found in *Tinker v. Des Moines Independent School District's* now famous acknowledgment that students do not "shed their constitutional rights...at the schoolhouse gate." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).

School policies that significantly burden a student's fundamental rights (i.e., rights explicitly or implicitly guaranteed by the federal/state Constitution) or differentiate based on a suspect classification (i.e., race, sex, religion or national origin) must be viewed under a strict scrutiny standard. This test requires the district to show that it has a compelling interest in justifying the policy and that there is no less burdensome way in which the desired goals can be accomplished. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 732 (1985) and *Graham v. Richardson, Sailer v. Leger*, 403 U.S. 365 (1971). In these cases, a traditional strict scrutiny constitutional analysis must be proven in order to validate the school policy.

On the other hand, if school rules and policies do not impact a fundamental right, the district only needs to show that the policy is rationally related to a legitimate school purpose. *See, e.g., Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) and *McGowan v. Maryland*, 366 U.S. 420 (1961).

Interestingly, the courts have clearly established that the "right to education [is] not guaranteed, either explicitly or implicitly, by the Constitution, and therefore could not constitute a fundamental right." *San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35-37* (1973). Hence, many school policies, such as discipline, can never rise to the level of a protected fundamental interest and must only be proven using the mere rationality test.

C. Student Handbooks Compared to Criminal Laws and Due Process of Law

It is a well-settled principle that student handbook policies need not be as specific as criminal laws. *See, Bethel School District No. 403 v. Fraser*, 478 U.S. 675, (1986), *New Jersey v. T.L.O.*, 469 U.S. 325, (1985), *Goss v. Lopez*, 419 U.S. 565 (1975) and *Arnett v. Kennedy*, 416 U.S. 134, (1974). The reason for this distinction is twofold. First, criminal laws usually carry with them the possibility of imprisonment, loss of liberty or, in the extreme case, death if the defendant is convicted. Contrary to the wishes of many school administrators, the ultimate penalty for a school handbook violation is only expulsion from the district. Hence, criminal laws are required to be more specific, as a greater potential penalty must be afforded greater due process. For example, in *Goss*, the Court held that a ten-day suspension from school does not rise to the level of a penal sanction calling for procedural due process protections applicable to a criminal prosecution. *Goss* at 574-576.

Secondly, the courts have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *T.L.O.* at 340. "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Arnett* at 161.

Even though handbook policies are not required to be as specific as criminal laws, public school students and parents must still be afforded due process that is consistent with the penalty to be imposed. *See, e.g., Goss* at 474 and *Board of Regents of State Colleges v. Roth*, 408 U.S.

564 (1972). Additionally, the school rules must be narrowly tailored so that parents and students can adequately understand the exact nature of the prohibited activity. *See, e.g., Stephenson v. Davenport Community School District*, 110 F.3d 1303 (8th Cir. 1977). As the cases in Section III, below, will illustrate, failure to provide narrow, well-defined policies and failure to notify or provide adequate due process will usually invalidate the penalty.

D. The Courts Role in Determining School Policy

For the most part, courts have been hesitant to substitute the their judgment and discretion for that of the school district. Recently, the U.S. Supreme Court weighed in on this matter, stating that it is not the role of the courts "to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Anita J. v. Northfield Township-Glenbrook North High School District 225*, 1994 WL 604100 at 2 (N.D. Ill 1994). The Court further stated that the law should not be use to correct "errors in the exercise of discretion which do not rise to the level of violations of specific constitutional guarantees." *Id.* at 2.

As such, courts have generally affirmed the comprehensive authority of school administrators to prescribe and control conduct in schools, except in the case where intervention was necessary to protect fundamental constitutional safeguards. *See, e.g., Boucher v. School Board of School District of Greenfield*, 134 F.3d 821, 827 (7th Cir. 1998) (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969)).

III. Review of Case Law

A review of case law demonstrates that most cases regarding student handbooks center on two legal theories: breach of contract and vague/overbroad rules. Due to the marked difference in courts' holdings depending on the public/private school dichotomy, it is necessary to categorize the below-listed cases by whether the alleged events occurred in a public or private elementary/secondary school.

A. Breach of Contract

1. Public Schools.

Few cases have been decided on the issue of the contractual rights afforded parents/students by a student handbook. The three most often cited cases were all decided in 1999, and each court ruled that a student handbook does not create a contractual relationship between parents/students and a public school district.

In *Achman v. Chisago Lakes Indep. School Dist. No. 2144*, 45 F.Supp2d 664 (D.Minn. 1999), a special needs students was disciplined was sexual misconduct with another student. Amongst other claims, the disciplined student argued that the student handbook was a contractual agreement that provided him with certain enforceable rights. The court held that a student/school district relationship is not contractual in nature.

In *Zellman v. Indpt. School Dist. No. 2758*, 594 N.W.2d 216 (Minn.App. 1999), review denied (1999), a Minnesota court of appeals upheld a public school's discipline of a student for plagiarism. The student's parents alleged that the school breached a contract (student handbook). The court stated, "[a]lthough a student handbook provided by a university or private school may form a unilateral contract, we decline to extend this doctrine to a student handbook provided by a public school district."

Finally, in 1999, a federal district court in Indiana was asked to rule on a contractual element of a lawsuit brought by the parents of a student that was strip-searched for missing money. *Higginbottom v. Keithley*, 103 F.Supp.2d 1075 (S.D.Ind. 1999). In its analysis, the court states that "unlike the university setting where students pay tuition and generally operate as adults, the relationship between elementary students and a public school is not by its nature contractual." Therefore, the school correctly noted that the student handbook fails to establish a contractual relationship. Citing *Achman* and *Zellman*, the court said that even those courts that construe an employee handbook as a contract have failed to import such logic to public elementary and secondary schools, even where such schools issue student handbooks.

2. Private Schools.

Unlike the outcome in public school cases, student handbooks at a private school are usually considered contractual in nature. "But for special statutes, such as those governing student records, the rights of private school students and their parents are largely defined by the express and implied terms of their contract with the private school... Where the school adopts certain grievance procedures, such as appeal hearings or arbitration, these will be considered binding upon the school as well as the students." Valente, Law in the Schools, 1980.

To succeed in a breach of contract suit, plaintiffs must prove both that (1) the handbook created contractual rights between the school district and the parents/students, and (2) the school district violated the handbook. *Iwenofu v. St. Luke School*, 724 N.E.2d 511 (Ohio App. 1999). The issues of breach of contract in private schools is distinct from public schools since most private schools require students' parents to enter a contractual agreement for payment of tuition. Typically, these tuition contracts do not commit a private school to do anything other than provide a state-accredited program of education. However, a majority of breach of contract cases is a result of perceived excesses of student discipline.

When a private school disciplines a student it must adhere to a two-prong process: (1) follow its own established procedures for dismissal, and (2) follow a procedure that is fundamentally fair. *Hernandez v. Don Bosco Preparatory High*, 730 A.2d 465 (N.J.Super 1999). For example, in *Vanloock v. Curran*, 489 So.2d 525 (Ala. 1986), rehearing denied (1986), the Alabama Supreme Court ruled rejected a private school's motion to dismiss a complaint for breach of contract. The court ruled that an implied contract existed between parents and the private school upon the school's acceptance of the students' registration. The student handbook provided detailed procedures for expulsion and appeal of this decision. The court ruled that the school, by contract, did provide its students with certain due process protections.

B. Vague Policies

Student handbooks frequently contain language that is subject to more than one interpretation, either because the language is not clear on its face or because the language appears to be inconsistent with other handbook language or institutional practice. Mawdsley, Litigating Employee and Student Handbooks, 1996.

1. Public Schools

A court cannot impose its interpretation of school regulations in place of a school board's construction of its regulations. Bd. of Educ. of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982). However, the constitutional question for most courts is whether certain terms in a public school's policy sufficiently define what conduct was prohibited as to give adequate notice to students. Kolender v. Lawson, 461 U.S. 352 (1983). For example, in *Claiborne v. Beebe School Dist.*, 687 F.Supp. 1358 (E.D.Ark. 1988), a federal district court in Arkansas ruled unconstitutional the following student handbook provision, "any student using alcohol PRIOR TO coming on school grounds...will be expelled." The court determined that "prior to" was sufficiently vague so as not to put students on notice as to the specific referenced time frame.

A vague rule denies fair notice of the standard of conduct to which a citizen is held accountable and delegates discretion or interpretation of its meaning to subordinates. A person of ordinary intelligence must be able to reasonably interpret what conduct is prohibited, but it need not be defined with "mathematical precision." *Turner v. South-Western City School Dist.*, 82 F.Supp.2d 757 (S.D.Ohio 1999).

2. Private Schools

Private schools have broad discretion in making rules and establishing procedures to enforce those rules. Contracts for private education have unique qualities and must be construed to allow the institution's governing body to meet its educational responsibilities. Moreover, it is well established that courts will not interfere in the rule-making matters in the absence of a clear abuse of discretion by a board of education. *Iwenofu v. St. Luke School*, 724 N.E.2d 511 (Ohio App. 1999).

This legal premise was affirmed in *Hernandez, supra,* when the court noted that " a private organization has a great interest in controlling its own affairs. The judicial intrusion should be confined to procedures that are fundamentally unfair. For example, in *Flint v. St. Augustine High School*, 323 So.2d 229 (La.Ct.App. 1975), writ refused, 325 So.2d 271 (La. 1976), two students were expelled from St. Augustine High for smoking, a violation of the conduct code in the handbook. The court stated that private institutions have a near absolute right and power to control their own internal disciplinary procedure that, by its very nature, includes the right and power to dismiss students.

IV. Items That Every Student Handbook Should Include

Federal law, and no doubt the law of most states, requires that parents and students be provided with certain information at the start of school or upon transferring into the district. The student handbook is an excellent place to put this required information. Additionally, the handbook serves as a natural depository for other student and parent information. Listed below are policies that parents and students must be notified about, as required by federal law, and policies that the authors believe that every good student handbook should contain. Additionally, it is again recommended that school administrators consult their state's statutes, as they are likely to contain additional requirements.

Mandatory Notification (It is suggested that these mandatory policies be included in your student handbook):

1. The Federal Educational Rights and Privacy Act (FERPA) requires that at the beginning of each school year parents (and eligible students) must be notified of their rights under the Act, mainly to examine and control the students' records. 20 U.S.C. 1232g.

2. Students must be notified of the district's uniform grievance procedures. 34 C.F.R., Part 106.8(a).

3. Various civil rights Acts also require the district to notify parents, employees and community members of the district's uniform grievance procedures. Such notification must include the names, addresses and phone numbers of the district's nondiscrimination coordinator and complaint manager.

4. If a district participates in the National School Lunch or Breakfast Programs, the district must have a policy on eligibility for free or reduced-price meals. 7 C.F.R. 240.10.

5. Parents and students must be notified about the district's asbestos management plan. 40 C.F.R. 763.84.

Suggested Handbook Policies:

1. Preamble. A comprehensive statement giving the rationale for the school's rules and procedures is often helpful when defending the district against lawsuits, especially when it comes to fundamental student rights.

2. Statement of philosophy/mission statement. Such statement should include the school's general educational philosophy as well as student rights and expectations.

3. School calendar. This item should list all school days and important school events.

4. Discipline policies. Such policies should list all school rules and disciplinary consequences.

5. Attendance policy. A good attendance policy should include reporting of student absences, student emergencies and consequences of truancy. Also included should be information on notification of parents regarding unexcused student absences.

6. Records policy. In addition to the mandatory reporting requirements of FERPA, an effective policy should include the school's use and maintenance of student records.

7. School fees. The handbook should contain a complete list of school fees (including activity fees) and the district's policy for exemption from payment.

8. Grading and curriculum policy. Such information should include course offerings, how grades are calculated, how credit is received, weighting of classes, required courses, and promotion and graduation requirements.

9. Student testing and assessment. This policy should include the type of student assessment by grade level and dates of administration if known.

10. Student health regulations. This item should include information on health requirements, immunization, and infectious diseases.

11. Student medication. Medication policies should include the district's rules with respect to prescription and non-prescription medication and should discuss administration, self-medication and storage of medicine.

12. Locker search policy. The policy should contain a statement that school lockers are owned and controlled by the district and that locker inspections may occur periodically throughout the school year.

13. Discrimination policy. The policy should contain a statement verifying equal opportunities without respect to race, sex, religion, color, national origin, or physical or mental handicap.

14. Sexual harassment policy. The district's sexual harassment policy should be stated in full. Included should be the names, addresses and phone numbers of persons with whom students can report or discuss harassment issues.

15. Transportation. This policy should include information on bussing, dropping off students at school, and student drivers.

16. Breakfast and lunch programs. As noted above, this policy should contain the criteria for free and reduced-price meals.

17. Athletics and extracurricular activities. This policy should cover athletics as well as all student clubs and activities.

18. Drug and alcohol policy. This policy should include prohibitions under the federal Safe and Drug-Free Schools and Communities Act of 1994 (20 U.S.C. 7701).

19. Student appearance. Schools should include acceptable and unacceptable student dress and accessories.

20. Computer acceptable use policy. It is suggested that this policy cover all scholarly and personal use of school computers and receiving personal e-mail via school computers.

21. Special education programs. All handbooks should contain a comprehensive description of special education services that the district provides.

22. Visitor policy. It is highly recommended that all visitors check in with the central office upon arrival to the school.

23. Jurisdictional statement. It is helpful to include a statement that all handbook and school rules apply to all school-sponsored events, even those activities occurring off-campus.

24. Disclaimer. Often student handbooks contain a disclaimer stating that the handbook does not equate to an irrevocable contractual commitment to the student, but only reflects the current status of the rules and policies. Such statements are often helpful in employment manuals, though their usefulness in student handbooks is questionable.

V. Tips for Handbook Development and Revision

1. **Review your handbook often**. Whether this is done by a committee, board or individual administrator, a school district should review its handbook on an annual basis. State and federal laws and case law changes frequently and your handbooks must be updated to reflect the latest thinking.

2. **Publicize, publicize, publicize**. Make sure that all parents and students get a copy of the handbook and are aware of the policies of the school and district. Some ways to accomplish this are: student assemblies, open school meetings, and student and parent sign-offs.

3. **Notify the staff**. Make sure that all staff members are aware of the school and district policies, especially as they pertain to discipline. Negligent staff work is one sure way to wind up in court.

4. **Do not presume your handbook to be all-inclusive**. Every year, and probably more often, administrators encounter new situations that could not have ever been anticipated by the student handbook. For example, who would have ever predicted the prevalence of laser pointers, Pokemon cards and reality pets? Make sure that your handbook allows the flexibility for administrators to discipline for the unexpected and unanticipated.

5. **Look at the handbook from the student and parent's perspective**. Handbooks should be user-friendly. Make sure that school policies are clear and understandable to students and parents.

6. **Make sure the school board adopts all school policies**. Significant legal problems can occur if the school's policies are not consistent with board policy. Having school policies adopted by the board is an easy way to prevent a potentially embarrassing legal mess.

7. **Have a school attorney review all proposed changes in your handbook**. As noted above, the law changes quickly and these changes must be taken into account when handbooks are revised. Lawsuits are no doubt expensive, and a properly reviewed handbook can save you thousands of dollars down the road.

Update: Legal Issues in Teacher Evaluation and Remediation

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Introduction

Legislatures and other policy makers have always attempted to hold educators professionally accountable, but the last two decades of the twentieth century saw increasing calls for reform and accountability. A recurring theme in the reform movements sweeping the country during the 1980's and 1990's was concern about the manner in which school personnel, especially classroom teachers, were evaluated.

Since 1983, nearly every journal article or research report published on the topic of school reform or accountability begins by citing *A Nation at Risk: The Imperative for Educational Reform*.[1] That 1983 document from the National Commission on Excellence in Education addressed the need for improvement in teacher evaluation and provided impetus for state-level policy initiatives requiring improved teacher evaluation.

Teacher evaluation as an accountability tool was a theme reiterated in other reform-oriented reports commissioned by various interest groups, such as the Task Force on Education for Economic Growth (1983),[2] the Twentieth Century Fund (1983),[3] the Carnegie Corporation (1985),[4] the Research and Policy Committee of the Committee for Economic Development (1985),[5] and the National Governors Association (1986).[6] Each of these reports fueled concern about evaluation of teaching personnel, using reform and accountability as the backdrop.

Teacher evaluation stands as a heralded means of improving the delivery of education. Legislatures and state school boards often demand that teacher evaluation systems be put in place by local school systems, to set the stage for removing poor teachers. Local school boards adopt evaluation instruments and require their administrators use the instruments to get rid of problem teachers. However, as it will be shown, the policy initiative itself—its language, its structure, the procedures it requires—can be used to block a school administrator from prosecuting a successful termination action against the teacher or to disable the school board from even holding a hearing on a teacher's effectiveness.

The general rule—often called the "academic abstention doctrine"—is that a court will abstain from interfering with decisions of school officials and school boards, unless the decision represents an abuse of discretion, is irrational, or violates constitutional or statutory rights.[7] The purpose of this paper is to chronicle a newly-emerging means of subverting the academic abstention doctrine in teacher termination—the duty to remediate problem teachers—and examine statutory law for potential future exceptions to the academic abstention doctrine. The first part of this paper examines case law where courts have required school administrators to enter into a remediation phase with a problem teacher before moving to terminate the teacher. The second part of this paper explores policy decisions invested in state statutes on teacher evaluation. The third part of this paper describes Missouri's experience in seeking greater accountability via teacher evaluation. Consequently, this paper represents an interim report on how policy initiatives for accountability can be thwarted by unanticipated outcomes.[8]

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[1] This commentary is no different. *A Nation at Risk: The Imperative for Educational Reform*. National Commission on Excellence in Education. (1983).

[2] *Action for Excellence*. Task Force on Education for Economic Growth. Education Commission of the States (1983).

[3] *Making the Grade*. Task Force on Federal Elementary and Secondary Education Policy; Twentieth Century Fund (1983).

[4] *Education and Economic Progress: Toward a National Education Policy*. The Carnegie Corporation of New York (1985).

[5] Research and Policy Committee of the Committee for Economic Development (1985).

[6] *Time for Results. The Governors' 1991 Report on Education*. National Governors' Assocation (1986).

Remediation

In the early 1990's an increasing number of teacher termination cases were overturned by state courts on the grounds that the cause for dismissal of the teacher was a remediable cause and that the school administration could not proceed with the dismissal without first attempting to remediate the problem teacher. This emerging trend was apparently noticed by the editors of West Publishing Company. In 1993 that publishing company's digest system edited the headnote "Schools 141(4)" in its key number system to create a new headnote "Schools 147.26." For this study, state and federal court cases since 1970 involving adverse employment actions against teachers were collected using both these headnotes.[9]

Courts have recognized the duty to remediate problem teachers by interpretation of tenure statutes, evaluation statutes, state board regulations, or local school district policies. Frequently, language in a statute or policy speaking to improvement has provided sufficient rationale for the court to grant injunctive relief or a writ of mandamus to halt termination proceedings against a problem teacher. For example, Arkansas' Teacher Fair Dismissal Act required that school administrators address concerns in writing and document efforts to assist the problem teacher.[10] An Arkansas appeals court found in this language a duty to remediate before going forward with a teacher termination.[11] Ohio required local school boards to adopt evaluation procedures, including a requirement to evaluate a teacher by February 10th with two 30-minute observations and to provide recommendations for improvement.[12] From this language, the Ohio Supreme Court decided that a school board's failure to provide specific recommendations for improvement and the means to obtain assistance was a procedural defect, sufficient to reverse a nonrenewal decision.[13] Some states are more straightforward about the duty to remediate. California's tenure statute demands that administrators observe a 45 calendar-day remediation period before teacher termination or suspension.[14]

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[7] *See, eg.,* Wynne v. Tufts University School of Medicine, 932 F.2d 19, 67 Educ. Law Rep. [497] (1st Cir. 1991).

[8] At last count, the authors have identified at least ten separate research outcomes that can be addressed from their merged data.

[9] *See* Appendix A, Remediation Cases, *infra.* Note: appendices will be handouts for the ELA presentation.

[10] Ark. Stat. Ann. 80-1266.6.

[11] Caldwell v. Blytheville, Arkansas, School Dist. No. 5, 746 S.W.2d 381, 45 Educ. L. Rep. [873] (Ark.App. 1988).

[12] Ohio R.C. 3319.111.

[13] *See* Naylor v. Cardinal Local School Dist. Bd. Of Educ., 630 N.E.2d 725, 90 Educ. L. Rep. [391] (Ohio 1994).

[14] West's Ann. Cal. Educ. Code Sec. 44938.

Arizona's statute requires a 90-day opportunity to correct inadequacies,[15] and New Jersey requires a 90-day remediation period after written notice of inefficiency.[16]

The state with the greatest amount of litigation on teacher remediation has been Illinois, where the courts of that state first interpreted the then-existing tenure statute to require school administrators to remediate a problem teacher before proceeding with a termination action against the teacher.[17] Illinois later added an evaluation statute that included specific remediation requirements.[18] Courts in Idaho,[19] California,[20] Arkansas,[21] Arizona,[22] New Jersey,[23] South Carolina,[24] West Virginia,[25] and Minnesota[26] also interpreted their tenure statutes to require a remediation period prior to terminating a problem teacher. Courts in Washington,[27] Missouri,[28] Louisiana,[29] Ohio,[30] Kansas,[31] Nebraska,[32] Utah,[33] and Michigan[34] require remediation or an improvement plan for problem teachers, arising from each state's legislation about the evaluation of teachers. And under a parallel statute—called in Oklahoma an "Admonishment Statute"—an Oklahoma appeals court found a duty to remediate problem teachers. In contrast to the findings in all of these listed states, a Colorado appeals court denied that a private right of action existed under that state's evaluation act.[35]

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[15] Ariz.Rev.Stat. 15-538.

[16] N.J.S.A. 18A:6-11.

[17] Ill. Rev. Stat. Ch. 122, par. 24-12. *See* Paprocki v. Board of Education, 334 N.E.2d 841 (Ill.App. 1975).

[18] 105 ILCS 5/24A-4, -5.

[19] Gunter v. Board of Trustees, Pocatello School Dist. No. 25, 854 P.2d 253, 83 Educ. L. Rep. [1132] (Idaho 1993).

[20] Blake v. Commission on Professional Competence (Capistrano Unified School Dist., 260 Cal.Rptr. 690, 54 Educ. Law Rep. [925] (Cal.App. 1990).

[21] Scoggins v. Board of Educ., Nashville, Arkansas, Public Schools, 853 F.2d 1472, 48 Educ. Law Rep. [772] (8th Cir. 1988). Caldwell v. Blytheville, Arkansas, School Dist. No. 5, 746 S.W.2d 381, 45 Educ. L. Rep. [873] (Ark.App. 1988).

[22] Roberts v. Santa Cruz Unified School District No. 35, 778 P.2d 1294, 55 Educ. L. Rep.[1175] (Ariz.App. 1989).

[23] Rowley v. Board of Educ. of Manalapan-Englishtown Regional School Dist., 500 A.2d 37, 28 Educ. L. Rep. [826] (N.J.Super.A.D. 1985).

[24] Hall v. Board of Trustees of Sumter County School Dist. No. 2, 499 S.E.2d 216, 125 Educ. L. Rep.[1362] (S.C.App. 1998).

[25] Mullins v. Kiser, 331 S.E.2d 494, 25 Educ. L. Rep. [1276] (W.Va. 1985).

[26] Kroll v. Indep. School Dist. No. 593, 304 N.W.2d 338 (Minn. 1981).

[27] Wojt v. Chimacum School Dist. 49, 516 P.2d 1099 (Wash.App. 1973).

[28] Hanlon v. Board of Educ., Parkway School Dist., 695 S.W.2d 930, 27 Educ. L. Rep. [991] (Mo.App. 1985).

[29] McKenzie v. Webster Parish School Bd., 653 So.2d 215; 99 Educ. L. Rep. [1142] (La.App. 1995). LSA-R.S. 17:391.5(C) was subsequently repealed.

[30] Farmer v. Kelleys Island Board of Educ., 594 N.E.2d 204, 75 Educ. L. Rep. [451] (Ohio Com.Pl. 1992).

[31] Marais Des Cygnes Valley Teachers' Association v. Board of Educ., Unified School Dist. No. 456, Osage County, 954 P.2d 1096, 125 Educ. L. Rep. [909] (Kan. 1998).

[32] Cox v. York County School Dist. No. 083, 560 N.W.2d 138, 116 Educ. L. Rep. [781] (Neb. 1997).

[33] Broadbent v. Board of Educ. of Cache County School Dist., 910 P.2d 1274, 106 Educ. L. Rep. [1373] (Utah App. 1996). The Utah court acknowledged the right to remediation for tenured teachers, but rejected the right for probationary teachers.

[34] VanGessel v. Lakewood Public Schools, 558 N.W.2d 248, 115 Educ. L. Rep. [496] (Mich.App. 1996).

[35] Axtell v. Park School Dist. R-3, 962 P.2d 319, 128 Educ. L. Rep. [1269] (Colo.App. 1998).

Teachers facing termination have also used language from state regulation or local school board policy to attempt to stop the termination action. Courts in Maryland,[36] West Virginia,[37] and South Dakota[38] interpreted local school board policies on teacher evaluation to require remediation periods for problem teachers. South Dakota's remediation case was unique in that the state's department of labor was called in to enforce a school district policy to remediate problem teachers. A New York court decided that evaluation procedures published by the school commissioner's office were directory, not mandatory, so that a specialized remediation period was not required for a problem teacher.[39] A Wyoming court, faced with the question of whether evaluation procedures published by a local school board creates a duty to remediate, was the only court to reject the argument.[40]

A threshold question in the court cases about teacher remediation was whether the cause of dismissal was remediable or irremediable. An Illinois court called remediability of the cause of dismissal a jurisdictional question.[41] Quite simply, if the cause of dismissal is remediable, then the dismissal action cannot continue until remediation has been addressed. This is because the local school board does not have jurisdiction to hold the dismissal hearing. If the cause is not remediable, then the dismissal action may continue without a remediation period. Where there are mixed causes, where one cause is remediable and another cause is not remediable, the school board is generally not required to follow remediation procedures.[42] For example, in a situation where a Louisiana teacher was charged with causes of incompetency (a remediable cause), as well as dishonesty and willful neglect of duty (irremediable causes), the school board was permitted to initiate termination proceeding without diverting to a remediation period.[43]

Swader (1997) found that within the states, fifty-four causes of dismissal are identified.[44] In the cases on the duty to remediate it seems clear that incompetency is always considered remediable. Consequently, a school administrator will be required to enter into a remediation period and clearly do something that counts as remediation within her state before taking the case to the school board, when the teacher's competency is the issue. (Remember that if the cause is remediable, the school board lacks jurisdiction to hold a hearing.) For the fifty-three other causes of dismissal listed in the statutes across the states, courts will likely have to address each cause to determine if it is remediable or not.

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[36] Board of Educ., Baltimore County v. Ballard, 507 A.2d 192, 31 Educ. L. Rep. [900] (Md.App. 1986).

[37] Wren v. McDowell County Board of Educ., 327 S.E.2d 464 (W.Va. 1985). *See also,* Holland v. Board of Educ. of Raleigh County, 327 S.E.2d 155 (W.Va. 1985).

[38] Iverson v. Wall Board of Educ., 522 N.W.2d 188, 94 Educ. L. Rep. [499] (S.D. 1994).

[39] Kurey v. New York State School for the Deaf, 642 N.Y.S.2d 415, 109 Educ. L. Rep. [900] (N.Y.A.D. 1996).

[40] Leonard v. Converse County School Dist. No. 2, 788 P.2d 1119, 59 Educ. L. Rep. [534] (Wyo. 1990).

[41] Aulwurm v. Board of Education, 367 N.E.2d 1337 (Ill. 1977).

[42] Matter of Peterson, 472 N.W.2d 687, 69 Educ. L. Rep. [153] (Minn.App. 1991).

[43] Spurger v. Rapides Parish School Board, 628 So.2d 1317, 88 Educ. L. Rep. [519] (La.App. 1993).

[44] Swader, "Statutory Causes of Public School Teacher Dismissal: 1986-1996." Ph.D. dissertation. The University of Alabama and the University of Alabama at Birmingham, 1997.

The cases identified in this study demonstrate that certain causes of dismissal are decidedly not remediable. For example, sexual improprieties with students,[45] theft,[46] and other unethical conduct like cheating on standardized tests[47] have been found irremediable. When the teacher is charged with other forms of wrong-doing, whether the cause is remediable is less clear. Inherent in the analysis is the question of whether the wrong-doing exists as an isolated incident or is rather a series of incidents indicating a general course of bad behavior by the teacher. For example, a school nurse's one-time failure to obtain parental consent before given inoculations to students was considered remediable by an Illinois court.[48] Similarly, excessive use of corporal punishment in a confined time setting was also found to be remediable.[49] In contrast, a California court found a teacher's continued, repeated use of corporal punishment to be not remediable.[50]

Courts have also begun to address what happens in remediation. The emerging right to remediation appears to have three elements, or stages, of remediation. The stages of remediation appear to be: 1) notice; 2) the remediation action; and 3) findings. The first stage, notice, apparently must be given in writing and, at least in Illinois, must come from the board rather than the administrative staff.[51] The notice must be specific and state a valid statement of concern. For example, an Idaho school board lost its case when it merely stated that it thought it could get a better teacher.[52] The second stage, the remediation action itself, seems to have a very low threshold for compliance. In other words, the administrator need not do much that counts for remediation. For example, an Ohio court found this requirement to be met simply by specific recommendations written on an evaluation document and the words "speak with your department chairman."[53] The third stage, findings issued by the board, may be the most prescriptive stage of the three. It requires that the school board issue findings of fact that include evidence of the cause for dismissal and not merely repeat the charges alleged in the warning letter.[54] For example, an Illinois court overturned a teacher dismissal when the school board only offered the same wording as given at the outset of the remediation period, instead of showing that it had investigated and exercised its discretion in determining whether the teacher had in fact improved or not.[55]

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[45] Board of Education of Argo-Summit School Dist. No. 104, Cook County v. Hunt, 487 N.E.2d 24, 29 Educ. L. Rep. [690] (Ill.App. 1985). Fisher v. Independent School Dist. No. 622, 357 N.W.2d 152 (Minn.App. 1984). Forte v. Mills, 672 N.Y.S.2d 497, 126 Educ. L. Rep. [362] (N.Y.A.D. 1998).

[46] Matter of Shelton, 408 N.W.2d 594, 40 Educ. L. Rep. [985] (Minn.App. 1987).

[47] Scoggins v. Board of Educ., Nashville, Arkansas, Public Schools, 853 F.2d 1472, 48 Educ. L. Rep. [772] (8th Cir. 1988).

[48] Board of Education, City of Chicago v. Illinois State Board of Education, 513 N.E.2d 845, 42 Educ. L. Rep. [296] (Ill.App. 1987).

[49] Russell v. Special School District No. 6, 366 N.W.2d 700 (Minn.App. 1985).

[50] Woodland Joint Unified School Dist. v. Commission on Professional Competence (Zuber), 4 Cal.Rptr.2d 227, 72 Educ. L. Rep. [261] (Cal.App. 1992).

[51] Paprocki v. Board of Education, 334 N.E.2d 841 (Ill.App. 1975).

[52] Brown v. Caldwell School Dist. No. 132, 898 P.2d 43, 101 Educ. L. Rep. [1167] (Idaho 1995).

[53] Thomas v. Newark City School Dist. Board of Educ., 643 N.E.2d 131, 96 Educ. L. Rep. [242] (Ohio 1994).

[54] Selby v. North Callaway Board of Educ., 777 S.W.2d 275, 56 Educ. L. Rep. [656] (Mo.App. 1989).

[55] Chicago Board of Educ. v. Smith, 664 N.E.2d 113, 109 Educ. L. Rep. [863] (Ill.App. 1996).

The right to remediation is a right given to teachers growing largely out of prescriptive language in statutes, state regulations, and local board policies about teacher evaluation. This emerging teacher right has become firmly established in many states, and it serves to add a series of new procedural steps that school administrators must take before going forward with the termination of an employment contract for a problem teacher. Of particular interest to the researchers for this study was to project what other procedural steps may need to be added, based on language in evaluation statutes adopted by the states. For that purpose, a review of evaluation statutes was accomplished.

Evaluation Statutes

To assure that all evaluation statutes were located, four methods were used. Computer searches were done using both Lexis and Westlaw. Then, each individual state code was taken down from the shelves of a law library and checked by hand. At this step, the Lexis and Westlaw citations were checked against the published version and the topical index for each state was reviewed for conformance with the computerized citations. Finally, the state department of education in each state was called and the person who provided liaison with legislative committees was asked personally to send copies. Through this method, it was ascertained that forty-one states have statutes regarding evaluation of classroom teachers.[56] A forty-second state, Idaho, requires evaluation of teachers, but such prescription is located within the statute providing for teacher contracts rather than in a separate evaluation statute.[57]

The statutes vary widely in the direction given to local school districts about teacher evaluation. Even within states, many statutes provide internally inconsistent, mixed guidance for districts to operate under. Certainly language in the statutes produce many ambiguities. Noted within the statutes were statements of purpose for the evaluation, statements of use of the evaluation, and statements of use of documents developed in the evaluation process. This formulation conforms to the analysis of evaluation policies used by Furtwengler.[58]

Fifteen of the forty-one statutes have a stated *purpose* for doing the evaluation. Of these fifteen statutes, most provide formative statements of purpose. Among the purposes listed are professional growth,[59] constructive assistance for teachers,[60] improvement of instruction,[61] improvement of performance,[62] enhancing the curriculum,[63] identifying behaviors that contribute to student progress,[64] and improving educational services.[65] Only two states indicate a summative purpose, in both situations that the purpose of the evaluation system is to aid in the dismissal of poor teachers.[66]

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[56] *See* Appendix B, *infra*.

[57] Idaho Code Sec. 33-514—515.

[58] Furtwengler, C. State actions for personnel evaluation: An analysis of reform policies, 1983-1992. Education Policy Analysis Archives, Volume 3, Number 4. (1995).

[59] Ore. R.S. Sec. 342.850; Rev. Code Wash. (ARCW) Sec. 28A.405.100; Utah Code Ann. Sec. 53A-10-101.

[60] Nev. Rev. Stat. 391.3125.

[61] Colo. Rev. Stat. 22-9-106.

[62] Alaska Stat. 14-20-149; Ariz. Rev. Stat. 15-537; Ky. Rev. Stat. 156.101; W. Va. Code 18A-2-12.

[63] Colo. Rev. Stat. 22-9-106.

[64] Utah Code. Ann. Sec. 53A-10-101.

There are thirteen state statutes in which the *use* of the evaluation can be identified. In contrast to the stated purpose of the evaluation system, the stated use of the evaluation system is invariably for summative purposes. The dominant statutory use of the evaluation system is for dismissal of problem teachers.[67] Other uses delineated by statutes include preparation for hearings,[68] production of evidence,[69] discovery,[70] demotion,[71] immediate discharge,[72] and production of exhibits.[73] Only one statute mentions that the use of the evaluation system is to be directly tied to a plan of action for improvement.[74]

Of the forty-one state statutes on evaluation of teaching, fifteen statutes require the production of a written document to address improvement of deficiencies or weaknesses effecting teaching and learning that have been identified through the evaluation process.[75] Another eleven states speak to the need for an improvement plan, without specifying that the plan be reduced to writing.[76]

Twelve of the fifteen state statutes that require the production of a written improvement plan go on to specify a use for the improvement plan.[77] In most state statutues, the use of the improvement plan generally is stipulated to be for summative uses. This too is internally inconsistent with the stated purpose of the plan, which is usually formative. Only two states, Indiana and Kentucky, suggest formative uses for the plan. Some of the states give mixed messages on usage of the plans stating that the plans are to be used for both summative and formative uses. For example, West Virginia states that the plans are to be used for "improvement, dismissal, and increased professional growth."[78] Similarly, Colorado specifies that the plans be used for "improvement, dismissal, correction of deficiencies, and to recommend for future improvement."[79]

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[65] Illinois 105 ILCS 5/24A-1.

[66] 70 Okla. Stat. Sec. 6-101.24; W.Va. Code 18A-2-12.

[67] Colo. Rev. Stat. 22-9-106; 24 Penn.Stat. 11-1123; Illinois 105 ILCS 5/24A-5; Nev. Rev. Stat. 391.3125; Mass. Ann. Laws ch. 71, sec. 38; N.C. Gen. Stat. 115C-333.

[68] Ariz. Rev. Stat. 15-537.

[69] Ariz. Rev. Stat. 15-537; La. Rev. Stat. 17:391.5.

[70] Ariz. Rev. Stat. 15-537; La. Rev. Stat. 17:391.5.

[71] Mass. Ann. Laws, ch. 71, sec. 38.

[72] Idaho Stat. 33-514.

[73] La. Rev. Stat. 17:391.5

[74] N.C. Gen. Stat. 115C-333.

[75] The fifteen states with such statutory provisions are: Alaska, Arizona, Colorado, Illinois, Louisiana, Michigan, Nebraska, Nevada, Ohio, Oregon, South Carolina, Tennessee, Utah, Washington, and West Virginia.

[76] The eleven states with such statutory provisions are: Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Massachusetts, New Jersey, North Carolina, Oklahoma, and Texas.

[77] The twelve states with such statutory provisions are: Alaska, Arizona, Colorado, Illinois, Louisiana, Nevada, Ohio, Oregon, Tennessee, Utah, Washington, and West Virginia.

[78] W. Va. Code sec. 18A-3A-3; 18A-2-12A; 18-2-23A.

[79] Colo. Rev. Stat. 22-9-106.

Only six states specify something in all three areas: the purpose of the evaluation; the use of the evaluation; and the use of the improvement plan.[80] Often, the three areas are also internally inconsistent and contradict each other. Again, such internal inconsistencies offer opportunities to defeat the general rule of academic abstention. For Alaska, none of the three statements conform with either of the other two. For Arizona, Illinois, and Nevada, two of the three statements are conforming. But for Colorado, two of the three statements are non-conforming. Only Oklahoma has conforming statements in all three areas.

It should be stressed that internal inconsistency was noted in a number of statutes. This was especially true in comparing purpose statements with use statements. In other words, while the purpose statement almost always spoke to formative evaluation, the use statement almost always spoke to summative evaluation. This internal inconsistency may in the future subject school districts operating in those states to charges of irrationality, sufficient to defeat the academic abstention doctrine. As it will be shown, other problems exist in the language in these evaluation statutes. These problems may be sufficient to persuade a judge to abandon academic abstention and interrupt the termination of problem teachers.

Creation of Exceptions to the General Rule of Academic Abstention

Again, the general rule is that a court will abstain from interfering with decisions of school officials and school boards, unless the decision represents an abuse of discretion, is irrational, or violates constitutional or statutory rights. This rule, the academic abstention doctrine, provides the court with justification for not involving itself in adverse employment actions unless it is presented with evidence that the employing school board's actions are procedurally suspect or are irrational or an abuse of discretion.

Faced with notice that the school board will soon hold a hearing about her continued employment, a problem teacher contacts an attorney. The attorney asks the court for injunctive relief and a writ of mandamus to block the board from going forward with the termination action. The teacher will likely receive equitable relief if there is evidence supporting the need to defeat academic abstention.

In teacher termination actions, the academic abstention doctrine would allow the court to simply rely on the judgment of the school administrator, that a teacher does not meet minimum accountability standards for teachers in the school district. The administrator's judgment is reinforced by the administrator's administrative certificate, which serves as evidence of legal competency to make the judgment. Traditionally, in the absence of any other legislative pronouncements, the administrator's judgment about the teacher's competency is unassailable. But when the legislature speaks to any aspect of teacher termination or teacher evaluation, even in making a good-faith effort to assist school districts in ridding themselves of problem teachers, the impact is likely to have the opposite effect. The emerging duty to remediate problem teachers is an example of this opposite effect. This opposite effect thwarts administrative judgment and is an opportunity to undermine the general rule of academic abstention. For example, in Baranek v. Joint Indep. School Dist. No. 287, the school district attempted to terminate a teacher for a history of berating students.[81] Although the teacher's current conduct of berating students was documented and testimony could be brought forward to show the teacher's history of such conduct, the absence of a prior written record about the teacher berating students made the conduct remediable, and the school district could not terminate the teacher. Or consider Board of Education of City of Chicago v. Johnson, where the school principal attempted to terminate a teacher whose physical use of discipline caused a student to suffer a broken rib and contusions.[82] Because the student's injuries caused the student to miss only one day of school, the Illinois appeals court determined that the cause of termination was remediable. The teacher remained employed.

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[80] States listing all three areas are Alaska, Arizona, Colorado, Illinois, Nevada, and Oklahoma.

The emerging right to remediation for problem teachers (which is also the emerging duty of school administrators to remediate problem teachers) is an example of the identification by courts of a statutory right that interrupts the academic abstention doctrine. A flow chart of procedures which must be followed in accomplishing a successful teacher termination are now expanded with the advent of the right to remediation.[83] What other opportunities to interrupt the academic abstention doctrine exist in current statutory law? Consider the following examples.

Nevada passed a statute in 1995 that requires evaluation of teachers and other school employees. The language of the statute is:

> 1. It is the intent of the legislature that a uniform system be developed for objective evaluation of teachers and other licensed personnel in each school district. 2. Each board, following consultation with and involvement of elected representatives of the teachers or their designees, shall develop a policy for objective evaluations in narrative form. The policy must set forth a means according to which an employee's overall performance may be determined to be satisfactory or unsatisfactory. The policy may include an evaluation by the teacher, pupils, administrators or other teachers or any combination thereof. In a similar manner, counselors, librarians and other licensed personnel must be evaluated on forms developed specifically for their respective specialties. A copy of the policy adopted by the board must be filed with the department. The primary purpose of an evaluation is to provide a format for constructive assistance. *Evaluations, while not the sole criterion, must be used in the dismissal process.* (emphasis added).[84]

Of particular interest is the last sentence: "Evaluations, while not the sole criterion, must be used in the dismissal process." The Nevada statute does not specify whether the requirement to use evaluations as part of the dismissal process continues or is suspended for causes of dismissal unrelated to the teacher's performance as a teacher. Nevada lists sixteen causes of dismissal in its tenure statute, including: inefficiency, immorality, unprofessional conduct, insubordination, neglect of duty, physical or mental incapacity, justifiable decrease in the number of positions, conviction of a felony or a crime involving moral turpitude; inadequate performance; evident unfitness for service; failure to comply with reasonable requirements; failure to show normal improvement and evidence of professional training and growth; advocating overthrow of the governoment; any cause constituting grounds for revocation of a teacher's license' willful neglect; or dishonesty.[85] Suppose that a teacher, accused of wrongdoing, allegedly has stolen $20 from a student or has had sex with a student. Must a current evaluation be accomplished and placed on file before proceeding against this wrongdoer? If it must, then a statutory right has been added to the procedures for terminating problem teachers, and another opportunity is created to undercut the academic abstention doctrine.

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[81] 395 N.W.2d 123, 35 Educ. L. Rep. [755] (Minn.App. 1986).
[82] 570 N.E.2d 382, 67 Educ. L. Rep. [229] (Ill.App. 1991).
[83] *See* Appendix C, *infra*.
[84] NRS 391.3125. Nevada Legislative Acts 1995, ch. 243, sec. 1.

Courts may also bypass academic judgment and abandon the academic abstention doctrine when the court confronts irrational policy. A tenet of teacher evaluation is that evaluation criteria used to measure teachers must be valid and observable, and the behaviors must be linked to teacher performance.[86] Consider therefore the criteria for judging a teacher's effectiveness, offered by the legislatures of several states.

Washington requires that criteria for evaluation be developed in the following categories: "the handling of student discipline and attendance problems; and interest in teaching pupils and knowledge of subject matter."[87] Florida's language demands that teachers show the "ability to establish and maintain positive collaborative relationships with students' families to increase student achievement."[88] Hawaii expects both "efficiency and ability"[89] Kansas asks that "consideration should be given to the following personal qualities and attributes: efficiency, personal qualities, professional deportment, ability, results and performance"[90] Pennsylvania specifies that the "employee shall be rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction . . ."[91]

Recall that a tenet of teacher evaluation is that evaluation criteria must be valid, observable, job-related behaviors linked to teacher performance. Is the handling of attendance problems job-related for Washington teachers, or is it an administrative responsibility, as it is in most states? Is maintaining positive collaborative relationships with students' families a valid, job-related behavior linked to performance in Florida? What is "efficiency," at least in Hawaii, and how does it relate to job performance? How exactly would a Kansas teacher demonstrate "professional deportment?" And in Pennsylvania, how does personality really fit in to this daily problem of growing schoolchildren? Is a different personality necessary for teaching kindergarten, as opposed to high school physics? Which theoretical school of psychology will we follow?

Courts would rather avoid dealing with academic problems if they can. Historically and traditionally, courts would abstain from interfering with academic issues. But, to practice academic abstention, a court must see evidence of academic judgment. As one court[92] put it, an academic ipse dixit[93] just doesn't suffice. How ironic it is that legislatures, by introducing more accountability in the teaching profession by way of mandatory evaluation, may be in fact making it more difficult to terminate problem teachers!

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[85] Nev. Rev. Stat. 391.312.

[86] Beckham, Ten Judicial "Commandments" For Legally Sound Teacher Evaluation, 117 Educ. L. Rep. [435] (June 12, 1997). *See also*, Donovan Peterson, Legal and Ethical Issues of Teacher Evaluation: A Research Based Approach, 7 Educational Research Q. Winter 1983. Pp 6-16.

[87] Rev. Code Wash. (ARCW) 28A.405.100.

[88] Fla.Stat. 231.29.

[89] Hawaii Rev. Stat. 302A-638 (1999).

[90] Kansas Stat. Ann. 72-9004.

[91] 24 Pa. Stat. 11-1123.

[92] Wynne v. Tufts University School of Medicine, 932 F.2d 19, 67 Educ. L. Rep. [497] (1st Cir. 1991).

The Missouri Experience

Legislation adopted in 1983 required the over-500 school districts in Missouri to adopt a comprehensive, performance-based evaluation process for each teacher employed by each school district.[94] The language for this prescription was:

> "In addition, the board of education of each school district shall cause a comprehensive, performance based evaluation for each teacher employed by the district. Such evaluations shall be ongoing and of sufficient specificity and frequency to provide for demonstrated standards of competency and academic ability. All evaluations shall be maintained in the teacher's personnel file at the office of the board of education. A copy of each evaluation shall be provided to the teacher and appropriate administrator. The state department of elementary and secondary education shall provide suggested procedures for such an evaluation."[95]

Separately, Missouri law lists the causes for termination of an indefinite contract with a permanent teacher:

> "[P]hysical or mental condition unfitting him to instruct or associate with children; immoral conduct; incompetency, inefficiency or insubordination in line of duty; willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him; excessive or unreasonable absences from performance of duties; or conviction of a felony or a crime involving moral turpitude."[96]

Language in MRS 168.116, Subsection 2 is the source of the duty to remediate problem teachers in Missouri:

> "At least thirty days before service of notice of charges of incompetency, inefficiency, or insubordination in line of duty, the teacher shall be given by the school board or the superintendent of schools warning in writing, stating specifically the causes which, if not removed, may result in charges. Thereafter, both the superintendent, or his designated representative, and the teacher shall meet and confer in an effort to resolve the matter.[97]

A close examination of the language within the statute indicates a three-step process that must be followed. Thirty days before the formal charges, the school board or superintendent must provide notice in writing of the specific charges. Notice becomes the first step of the process. The superintendent or the superintendent's representative must then "meet and confer" with the teacher to attempt to resolve the problem. The "meet and confer" provision is the second step of the process. The resulting formal charges become the third and final step of the remediation process. By the wording of the statute, one would presume that this three-step process applies to the statutory causes of incompetency, inefficiency, or insubordination in the line of duty, but does not apply to other causes (e.g., immoral conduct or excessive

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[93] Literally, "He himself said it." A bare assertion resting on the authority of the individual. BLACK'S LAW DICTIONARY 828 (6th ed. 1990). Also expressed as "because I say so" or "because I'm the mommy."
[94] Mo. Rev. Stat. Section 168.128. L. 1969 p. 275 sec. 168.114, A.L. 1983 H.B. 38 & 783.
[95] *Id.*
[96] Mo. Rev. Stat. Section 168.114, Subsection 1.
[97] Mo. Rev. Stat. Section 168.116, Subsection 2.

or unreasonable absence from performance of duties) listed in the termination statute.[98] A series of Missouri court cases define the contours of the remediation process.

Three cases provide some guidance on the first stage, the notice stage. In O'Connell v. School Dist. of Springfield R-12,[99] the court ruled that the statutory notice requirement was met by the maintenance of a record of negative evaluations, and that the statements contained within the evaluation documents provided sufficient particularity that was necessary to meet the statutory warning requirement. In contrast, a Missouri appeals court reinstated a terminated teacher when it found the school administration lax in identifying objectionable behaviors and targeting those behaviors for remediation.[100] And where a teacher had engaged in a variety of improper actions including inappropriate comments to students, problems with record-keeping, and use of a pay telephone against orders, a warning letter detailing these concerns was found sufficient to meet the notice requirement.[101] From these cases, it becomes evident that the notice must be in writing and must speak with sufficient particularity that the teacher cannot help but understand the nature of the problem.

The second stage of the remediation process in Missouri, the "meet and confer" provision, is a low threshold to meet. The school board is not required to reassign pupils, institute a new professional development plan, or enlist the aid of other professionals—functions usually considered part of a remediation activity—to comply with the statute.[102] Instead, merely conducting the evaluation and having a conference about the evaluation meets the "meet and confer" requirement.[103] And in Nevels v. Board of Educ. of School Dist. of Maplewood-Richmond Heights, the "meet and confer" requirement was met by meeting to discuss concerns outlined in the notice letter.[104]

The third and final stage of the Missouri remediation process requires the school board to exercise its judgment and issue findings of facts concerning the charges leveled against the teacher. It is inadequate to merely repeat the allegations that were made in the warning letter.[105] The school board must examine the evidence before it and demonstrate that it is exercising its discretion. For example, the Missouri appeals court upheld a tenured teacher's termination, where the teacher had been charged with failure to maintain discipline, failure to provide adequate individualized instruction, and failure to provide timely information on student progress.[106] After administrators had met with the teacher and discussed the problems, the board looked again at the teacher's situation. Although the teacher had improved somewhat and the evidence could support a different conclusion, the court accepted this exercise of the board's discretion.

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[98] Mo. Rev. Stat. 168.114.1

[99] 830 S.W.2d 410, 75 Educ. L. Rep. [626] (Mo. 1992).

[100] Iven v. Hazelwood School Dist., 710 S.W.2d 462, 32 Educ. L. Rep. [1136] (Mo.App. 1986).

[101] Nevels v. Board of Educ. of School Dist. of Maplewood-Richmond Heights, 822 S.W.2d 898, 72 Educ. L. Rep. [1181] (Mo.App. 1991).

[102] Newcomb v. Humansville R-IV School Dist., 908 S.W.2d 821, 104 Educ. L. Rep. [928] (Mo.App. 1995).

[103] *Id.*

[104] 822 S.W.2d 898, 72 Educ. L. Rep. [1181] (Mo.App. 1991).

[105] Selby v. North Callaway Board of Educ., 777 S.W.2d 275, 56 Educ. L. Rep. [656] (Mo.App. 1989).

[106] Johnson v. Francis Howell R-3 Board of Educ., 868 S.W.2d 191, 88 Educ. L. Rep. [1253] (Mo.App. 1994).

Most evaluation systems used in Missouri are modeled after a performance-based teacher evaluation system that was developed at the University of Missouri in the early 1980's. This system is based on the Steps to Effective Teaching Model espoused by Madeline Hunter. In the last year, the Missouri Department of Elementary and Secondary Education has charged school leaders to begin the process of developing a new model of performance-based teacher evaluation. Professors and educators from around the state were provided with training to serve as facilitators for school districts embarking upon this project. Current thinking about building new evaluation models favors the incorporation of authentic means of assessment, including the use of portfolios, peer review, student performance data, self-directed professional development by the teacher, and other factors agreed upon at the local level. Also proposed is a different way of looking at tenured teachers, including the use of mentors, placing teachers in action research teams, adopting a professional review process, adopting an individualized professional activity, fostering collaborative professional plan, and supporting school-wide or district-wide action research. In the absence of statutory changes which in turn would change the steps of remediation outlined above, Missouri school officials would need to consider how changes in the evaluation process would address the statutory duty to provide notice, meet and confer, and issue formal findings.

TITLE VII AND THE FIRST AMENDMENT:
Did the School District or Teacher Win?

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46th Annual Conference of the Educational Law Association
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I. INTRODUCTION

Teacher evaluation is a perennial source of conflict in education. Conflict often leads to disputes which often lead to court cases in order to resolve such disputes legally and formally. The dispute between teacher Leslie Cowan and her school district led to a court case that raised issues concerning community religious beliefs, supervisory integrity and consistency, teacher free speech, the board of education's justification for nonrenewal of the teacher's employment contract, reinstatement as a court-imposed remedy after a jury verdict in favor of the teacher, and the law's prohibition against religious discrimination. It is to these matters we turn our attention in exploring the case of Cowan v. Strafford R-VI School District[1] and then some related cases.

II. FACTS[2]

The Strafford School District is located about ten miles east of the city of Springfield, in southwest Missouri. On March 30, 1992, the BOE unanimously voted to renew Cowan's contract for a third year to begin in September, 1992. Then, on the last day of her second school year, in May 1992, Cowan sent a letter home with her students, congratulating the students for completing the second grade and making reference to a "magic rock" which she attached to the letter. Cowan had sent the same letter the prior year, also on the last day of school and also addressed to her students. The schools district did not receive any complaints at that time. The letter read:

> Dear Second Grader,
>
> You have completed second grade. Because you have worked so hard, you deserve something special and unique; just like you! That something special is your very own magic rock.
>
> The magic rock you have, will always let you know that you can do anything you set your mind to. To make your rock work, close you [sic] eyes, rub it and

> say to yourself three times, "I am a special and terrific person, with talents of my own!" Before you put your rock away, think of three good things about yourself. After you have put your rock away, you will know that the magic has worked.
>
> HAVE FUN IN THIRD GRADE!!!!!

Cowan gave the letters with the "magic rocks" to her students to encourage them to do well over the summer. She testified that she "thought it would be a good motivation for them at the end of the school year." Lucille Cogdill, Cowan's principal, testified that she viewed the Magic Rock Letter as a "method to boost self-esteem."

Sara Campbell, a parent whose daughter was in Cowan's class, showed the letter to her father, Reverend Frank Stark, the former pastor of the First Baptist Church of Strafford. Stark met with Cogdill to express his displeasure with the letters because it conflicted with his religious faith and to notify her about a forthcoming seminar on New Age beliefs and practices.

On August 13, 1992, after learning about Cowan's Magic Rock Letter from the parents and seeing a copy of it,[3] Cogdill for the first time (according to Cowan's testimony) told Cowan that Cogdill had concerns about Cowan's performance as a teacher. Cogdill referred to the Magic Rock Letter and the students' performances on the Missouri Mastery Achievement Test (MMAT). On the next day Cogdill told Cowan to "avoid any 'magical' ideas" in her teaching.

On August 28 Cogdill prepared and gave to Cowan two "job targets," or notices of deficiency, in regard to the major area of "Instructional Process." On a Job Target Sheet under the subheading of "Improvement Objective(s)" Cogdill wrote "1. Prepare lessons designed to achieve state and local objectives; 2. Communicate learning objectives to students."

On a second Job Target Sheet, dated August 29,1992, in regard to the major area of "Interpersonal Relationships" under the subheading "Improvement Objective(s)" Cogdill wrote, "1. Provides [sic] a climate which opens up communication between teacher and parent; 2. Initiates [sic] communication with parents when appropriate." The target date for completion of all four job target objectives was April 1993. Cogdill wrote that she would help Cowan achieve the objectives.

At the teachers' meeting at the start of the 1992-93 school year Cogdill told her teachers "to refrain from using words like magic or anything that would make people feel that [the teachers] were involved with New Age in the classroom." She said that she would attend a seminar on New Age "so that we don't have any misconceptions about what our school believes." She did attend and even spoke at the seminar.

On April 8, 1993 Cowan spoke to the BOE in executive session to present information to the board members prior to their voting of her renewal. The BOE voted unanimously on that date not to renew Cowan's contract for the next year. Cowan subsequently applied to other school districts for a teaching position but was unsuccessful in obtaining one. Cowan then began to work with her husband at their local gasoline station. (As of the summer of 2000 she still was working at the gasoline station.)

III. COMPLAINTS FILED

Cowan on or about June 14, 1994 filed a four-count complaint against the Strafford School District and Superintendent Tice in the United States District Court, Western District of Missouri, Southern Division, located in Springfield, Missouri.

Counts I and II of Cowan's complaint about religious discrimination arose out of Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, Public Law 102-66 (42 U.S.C. §2000e et seq) and out of the First and Fourteenth Amendments to the U.S. Constitution.

Count III of the complaint about retaliation for the exercise of free speech rights arose out of the First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. §1983.

Court IV arose out of the Missouri Fair Employment Practices Act, R.S. Mo. 213.000 et seq. (Since this state claim was parallel to the federal Title VII claim, it was merged with the Title VII claim during the subsequent trial

IV. COWAN'S CLAIMS IN THE DISTRICT COURT

A. The Establishment and Free Exercise of Religion

Cowan claimed that the cautions issued by Principal Cogdill against references to magic that could offend Strafford's religious community constituted a religious test for further employment for her as a public school teacher. As such, the BOE's nonrenewal action, based on Cogdill's recommendation, was a violation of the Establishment of Religion clause and the Free Exercise of Religion clause of the First Amendment.

B. Religious Discrimination in Employment

Cowan claimed that the BOE discriminated against her based on religion when it did not renew her employment contract. Such discrimination is prohibited by federal statute. Specifically, the Civil Rights Act of 1991 (Public Law 102-166, Nov.21, 1991) amended Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2) by adding the following subsection:

> "(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, *religion*, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice." [emphasis added]

Cowan claimed that the speech and acts of Cogdill in regard to religion constituted a "motivating factor" in Cogdill's recommendation to the BOE not to re-employ Cowan. In that way Cogdill and the BOE violated Cowan's Title VII civil rights.

C. Freedom of Speech

Cowan claimed that the BOE and Superintendent Tice violated her constitutional freedom of speech rights under the First Amendment. Cowan claimed that the speech contained in the Magic Rock Letter was "constitutionally protected speech and may not lawfully form the basis of a recommendation or decision not to renew plaintiff's teaching contract."[4] Specifically, the letter containing her protected speech was a "motivating factor" in defendant Superintendent Tice's recommendation and the BOE's decision not to renew [her] contract."[5]

V. DISTRICT COURT PROCEEDINGS AND DECISIONS

A. Pre-trial Motions

On January 12, 1995, which was seven months after Cowan filed her complaints with the district court, the defendants filed a motion for summary judgment on Counts I, II, and III. Judge Russell G. Clark, Senior Judge of the United States District Court, dealt with that motion in an Order dated June 14, 1995. The district court denied the defendants' motion for summary judgment on Count I, the Title VII claim of employment discrimination based on religion.

Judge Clark made two critical points in denying the motion. First, he noted that the key issue for deciding on the motion was whether there existed a genuine dispute about a material fact. The judge ruled that Cowan had indeed shown that there was a material factual dispute as to when the BOE discussed the renewal of her teaching contract. The question was: Did the discussion take place prior to the appearance of the Magic Rock Letter? The BOE claimed that the discussion was prior[6]; Cowan disagreed. The date of the discussion was critical to the BOE's case, as the BOE, Cowan, and the judge all agreed. If Cowan was correct about the date, she would be able to argue that the Magic Rock Letter precipitated the job targets, the recommendations for nonrenewal, and the negative vote by the BOE. Because of the dispute on the date, Cowan survived the defendants' motion. She could and would proceed to trial.

Second, recognizing that Cowan would need to present her case to a jury, Judge Clark also commented on the issue of whether a mixed-motive legal analysis applied to the case. The mixed-motive analysis stems from the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[7] If a mixed-motive analysis were applied, first Cowan would have to establish that religion was a motivating factor in the decision not to renew her teaching contract. Then the BOE would have the burden of persuasion to show that it would not have renewed Cowan's contract in any case.

In regard to Count II, the claim that defendants violated the religion clauses of the First Amendment, the defendants

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argued that the BOE had not established any religious test for its teachers to meet. Nor did it, it argued, restrict its teachers' rights to believe and practice their religious faiths. The district court granted summary judgment to the defendants on the claim of violation of the two religion clauses of the First Amendment. Cowan did not appeal this decision of the court. Therefore, Cowan's First Amendment religion claim dropped out of the case.

Judge Clark denied the motion for summary judgment on Count III, Cowan's First Amendment Free Speech claim. In setting the stage for dealing with this claim, the judge noted that pursuant to the precedent established by the Supreme Court in Mount Healthy City School District of Education v. Doyle[8] Cowan had the initial two-part burden in this suit. First, she had to establish that her speech in the letter was constitutionally protected. The BOE argued that the BOE relied solely on its evaluation of Cowan's poor teaching performance.

Cowan argued that her speech did not fall neatly into either of the two types of speech category, public concern or private, as defined in prior court decisions. For Cowan, her speech was not a matter of public concern as was the speech about the Vietnam War in Tinker v. Des Moines.[9] Nor was her speech like the speech about private grievances in Connick v. Myers.[10] Rather, she argued, her speech was protected because it was classroom speech. Judge Clark ruled that Cowan's speech was protected speech because it was valid classroom speech.

B. Jury Trial

The jury trial began on August 19, 1996 and lasted five days. The jury dealt only with Counts I and III Judge Clark, in recognition of the claim of religious discrimination under the above Title VII provision, allowed Cowan to proceed under a mixed-motive analysis, as set forth in Price Waterhouse. First, Cowan had the burden to prove that religion "played a motivating part in an employment decision."[11] Second, the BOE could "avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [unlawful criterion of religion] into account."[12] The jury found in favor of Cowan on both of the claims before it, awarding $18,000 (equivalent to one year's lost earnings) in damages on the Title VII religious discrimination claim but not awarding any damages on the Free Speech claim.

C. Defendant's Post-trial Motions

The BOE filed motions for judment notwithstanding the evidence and for a new trial. The BOE claimed that new evidence showed that the Board of Education had indeed discussed job targets for Cowan in March, 1992, thereby proving that the job targets of August, 1992, were not issued in response to the Magic Rock Letter, as claimed by Cowan. On December 12, 1996 the judge denied the motion for relief from judgment, stating that Cown's medical record supported Cowan's testimony regarding her miscarriage.

D. Plaintiff's Post-Trial Motion

The district court on December 12, 1996 also dealt with Cowan's motion for injunctive relief wherein Cowan requested reinstatement to her former position as an elementary school teacher in the Strafford School District. Judge Clark accepted the Supreme Court's and the Eighth Circuit's preference for reinstatement as a remedy for discrimination, but quickly added that "in extraordinary circumstances" reinstatement may not be the appropriate remedy for a Title VII favorable verdict.[13] The judge then went on to assert that evidence of "hostility" and "acrimony" existed such that it constituted "sufficient extraordinary circumstances to deny reinstatement to Cowan." Using his discretion and "equitable" power," the judge awarded the "fair and just" amount of two years of front pay, which came to $36,000 based on Cowan's salary of $18,000 per year. (This sum was in addition to the $18,000 awarded by the jury.)

VI. THE EIGHTH CIRCUIT APPELLATE DECISION

Both Cowan and the School District appealed to the Eighth Circuit Court of Appeals in St. Louis. Cowan challenged the district court's denial of reinstatement while the BOE appealed decisions that denied summary judgment, judgment as a matter of law, a new trial, relief from judgment, and reconsideration of a motion for a new trial. The appellate decision dealt with the seven points of district court error claimed by the defendant BOE and the one point claimed by the plaintiff Cowan. On all combined eight points claimed for appeal by the BOE and Cowan the appellate court affirmed Judge Clark's decisions at the district court level. On May 12, 1998, the Eighth Circuit denied the BOE's request for rehearing and a request for a rehearing en banc. Following the decision by the Appellate Court, Cowan reached a settlement with the School District. In return for not pursuing the case further Cowan accepted money to pay her lawyer's fees.[14]

VII. COMMENTARY

A. Introduction

The issues and specific questions raised by this Magic Rock Letter case are of eight types. The eight types are: (1) substantive law; (2) civil procedure law; (3) lawyering; (4) educational administration/supervision; (5) pedagogy; (6) organizational procedures; (7) social-political matters; and (8) reinstatement. While it is possible to separate out the eight types analytically, it is crucial to recognize that in a court case issues are intertwined. In the sections below we shall comment briefly (in this condensed version of the complete, long paper) on only some of the intertwined issues that appear in Cowan.

B. Substantive Issues: Religious Discrimination & Free Speech

1. Religious Discrimination

The focus on the Title VII claim was deserved because of at least five factors in the case: (1) the Title VII claim stemmed from a then-recent 1991 amendment to the Civil Rights Act of 1964, which altered the conceptual underpinning (proof scheme) for arguing an employment discrimination claim; (2) the focus on an attempt by a teacher to use a common element in children's literature, magic, to motivate her students to achieve improved self-esteem; (3) the involvement in the community in regard to religious comments about the use of magical ideas in teaching; (4) the strong hostility and acrimony that developed between the plaintiff teacher and the defendant BOE, as represented by the school principal and the district superintendent, and (5) the post-trial consequences for the teacher even though she won a favorable verdict on the two counts heard by the jury. The combination of just these five factors led to a strong reaction by virtually everyone connected with the case.

The Title VII amendment in the Civil Rights Act of 1991 was Congress's reaction to the 1989 *Price Waterhouse* decision by the U.S. Supreme Court. In that case, the Court, with only a plurality, decided that based on its interpretation of the Civil Rights Act of 1964 a new proof scheme was in order in discrimination cases where the employer had both legal and illegal motives for its actions.

2. Free Speech

The threshold issue of Cowan's free speech claim was significant legally and educationally. That issue was whether Cowan's speech, as contained in the Magic Rock Letter, was protected by the constitution. Generally, to be protected, speech by a public employee must be of public concern.[15] However, as Cowan contended, the dichotomy between public and private speech was set forth in *Connick* to apply to an assistant district attorney in New Orleans who opposed her transfer within her office and complained strongly about staff morale. Cowan rightly argued that the *Connick* dichotomy did not apply well at all to public school teachers. Much of what teachers say to their students does not fit neatly into either of the two *Connick* categories of speech in that teachers of necessity deal with knowledge, skills, personal values, and community values as they seek to educate their students. Cowan argued that the Magic Rock Letter was a good example of teacher speech that was neither purely public nor purely private. True, the letter was not about a broad political or social matter. On the other hand, it was not about a private grievance or other matter of personal interest. The letter stemmed from Cowan's classroom endeavor to motivate students to improve their self-esteem, a value encouraged by everyone concerned with the education of young students.

To his credit Judge Clark recognized that although Cowan sent the letter at the end of the school year, the letter was part and parcel of Cowan's classroom effort to educate her students. He said astutely, "While motivating students and instilling in them self-confidence may not be part of the formal curriculum [that is, the knowledge and skills prescribed and tested by the BOE], it is apparent that those issues are properly included in classroom instruction."[16] With this statement the judge determined that the Magic Rock Letter met two necessary characteristics of teacher protected speech, namely, the speech was classroom speech and that it was valid and proper speech, as distinguished from inappropriate or obscene speech.[17] He also determined that Cowan had not received prior notice that the school prohibited speech about magic. That is, in addition to being (1) classroom speech that was (2) valid and proper Cowan's speech about magic (3) had not been prohibited by the BOE. The Magic Rock Letter was now constitutionally protected speech as a limit upon the BOE's legitimate control of teacher speech. As such, Cowan was protected under the tradition of academic freedom.

C. Poor Lawyering and Civil Procedure

A close reading of court documents, including the district court decisions, the appellate court decision, and Cowan's and the BOE's briefs to the appellate court, reveals that the BOE committed both a strategic error and some tactical errors in defending its case against the Title VII and First Amendment free speech claims by Cowan. Crucially, it appears that the BOE never openly or explicitly challenged the basic premise of Cowan's Title VII claim. Cowan's premise was that her Title VII claim was theoretically grounded differently from virtually all other Title VII cases, especially so in the Eighth Circuit. That is to say, her Title VII claim was based on the theory that Title VII prohibits discrimination that stems from the religious sensibility of others. Cowan claimed that the Magic Rock Letter offended the religious sensibilities of people in the school district and in the larger Strafford community who then discriminated against her by creating an intimidating employment environment. Her claim was not the classic one where the discriminatory actions of the employer, based on the employer's religious beliefs, run counter to the religious beliefs of the employee. The critical consequence of the BOE's strategic inaction was that the appellate court refused to address the issue of whether Cowan stated a prima facie case under the *Price Waterhouse* mixed-motive analysis, which Judge Clark had directed the jury to use. The appellate court said that the prima facie case "is not properly before the Court"[18] because it "was not raised below."[19]

The BOE also made some tactical errors. Concerning the main one, Judge Clark commented on the BOE's "ineffective questioning" of Cowan during cross examination in the trial. The domino effect of the ineffective questioning by the BOE's trial lawyers led to the defeat of a critical defense point of the BOE, which led to the two verdicts in favor of Cowan, which helped lead to the denial by the district court of a motion for a new trial, which led to the affirmance by the Eighth Circuit of the district court's ruling on that matter.

D. Teacher Concerns and Administrative Supervision

Teachers constantly make decisions about what they will teach, how they will teach, and how they will meet the needs of their students. The college preparation of teachers rightly emphasizes that skillful decision making is an essential component of success and that teachers serve as members of teams in their schools. Cowan and related cases indicate that teachers do not have the pedagogical freedom that they prefer or have been led to believe they have. Teachers must realize that pedagogical decision making is most complex and that they need to keep their eyes on local school policy as well as community values. They need to stay in close contact with their colleagues, seeking advice as to what are the keys to professional success while they maintain local employment. What is acceptable elsewhere may not be so locally. For example, the 1998 Massachusetts Teacher of the Year won praise for using a magic rock activity similar to the one that led to Cowan's nonrenewal in Missouri.[20]

Administrators must not lose sight of the principles of sound supervision. They must guide their teachers firmly, clearly, and explicitly to excellent performance while giving them support. They must be able to demonstrate that their recommendations to teachers are based upon performance evidence. They need to remember to keep their word if they wish to maintain trust and credibility. After all, the jury in Cowan simply did not credit Principal Cogdill's testimony over Cowan's when it was revealed that Cogdill failed to do as she had promised: "I assured her that I would be positive and that I feel that my job is to keep her informed of any problems.... I told her that I would help her this year...."[21] Supervisors who do not provide ample documentation of their recommendations to teachers for improvement and of their own efforts to effect that improvement have little if any basis for subsequently recommending to their boards of education a negative employment decision. One primary lesson from Cowan for administrators is the need for the development of clear and approved curriculum and evaluation systems which have the support of teachers, supervisors, and members of the community.

E. The Influence of the Religious Community on the Schools

In the year 2000 it should come as no surprise to anyone who has followed American politics that religious conservatives are active politically today. During the 1980s and the 1990s the previously quiet, nonactivist fundamental Protestant Christian groups turned much of their attention to changing public education.[22] These groups spoke out deliberately and loudly on family values and education. They let their voice be heard in Strafford, Missouri, in the spring of 1992 through the work of the Christian Right. Detwiler defines the Christian Right as a "movement [that is] a loose network of conservative Christian activists guided by certain presuppositions, which center on the nature of reality or truth, the role of the public schools in protecting and advancing that truth, the reasons for the collapse of public education, and the theological justification for using political tactics to achieve a complete transformation of contemporary American culture."[23]

Whether the Christian community at large in Strafford or the First Baptist Church of Strafford in particular considered themselves members of the Christian Coalition or the Christian Right officially is of little consequence. What does matter is that Sara Campbell, her father Frank Stark (former pastor of the Baptist church), and Keith Vawter (current pastor of the Baptist church) all expressed ideas consistent with those of the Christian Right. The religious right community in Strafford, already sensitized to the alleged failure of the public schools and the alleged advances of New Age practices, pounced on the Magic Rock Letter as a concrete instance of the threat to their Christian faith and status. The members of the religious right sought to crush the use of magic because, as the anthropologists have shown, magic gives a sense of power and confidence.[24] Therefore, they sought to stop Cowan's teaching method as soon as they heard about it.

F. Reinstatement

We strongly disagree with Judge Clark's decision on the issue of reinstatement. When Cowan proposed the use of an outside evaluator to facilitate reinstatement, the judge rejected that possibility for the supervision and evaluation of Cowan.[25] First, the judge's decision presupposed that Cogdill and Tice as professional, certified educational administrators could not put aside their hostility under court order to further the purpose of Title VII. The judge did not take the position, as we believe he should have, that if Cogdill and Tice could not evaluate Cowan, then perhaps they should have stepped aside and been replaced by other administrators who could implement a court order to make Cowan whole.

Second, the judge's ruling ignored the fact that in Strafford there were at least two other certified administrators on the same campus, the middle school and high school principals. Most likely there were also other staff members who held administrator certificates, each of whom could have been designated by the judge as the court-appointed supervisor and evaluator of Cowan.

VIII. CONCLUSION

The conflict between the parties in Cowan started with a teacher's end-of-year letter to her students. The Magic Rock Letter evoked opposition and criticism from the leaders of a conservative Protestant church because of the use of magical rocks was contrary to their religious beliefs. The leaders believed that investing supernatural power in a rubbed rock indicated the teaching of New Ageism in the Strafford public elementary school, a practice which threatened and offended their religious sensibilities.[26]

However, despite the emphasis on this combination of fascinating reasons centered on magic, self-esteem, and religious beliefs, this Magic Rock Letter case ultimately is not about any of them or even all of them together. We need to recognize that Cowan, like its related cases, is ultimately about the integrity of public school education in our democratic society functioning under the Constitution.[27]yy Our focus on the integrity of the public schools will sharpen if we look at two key factors, the role of the religious right in our society and the behavior of the professional and lay leaders of the public schools.

First, Cowan leads us to consider the degree to which society at large will permit the minority religious right community to influence the workings of the public schools. The efforts by minority religious groups of all types to influence the curriculum and direction of the public schools presents a serious challenge to the role of the public schools as a unifying institution in our diverse society. The challenge exists because, on the one hand, some people are working to "re-Christianize the schools while, on the other hand, other people are abandoning the public schools by preferring to establish specialized charter schools, private sectarian schools, or home-schools.[28] Therefore, society at large must discuss the integrity and role of the public schools as religious conservatives along with the help of private entrepreneurs seek to change the enrollment, the tone, and the practices of our public schools.

Second, Cowan leads us to look at the actions of people leading our public schools, especially the professional administrators. The roles of the local superintendent and the local school principal are multifaceted, as any leadership role inevitably is. A local school administrator must lead the faculty while at the same time leading the community. The local administrators must lead, support, and develop the school's faculty members as they aim to provide an appropriate modern democratic education to the students. At the same time, the administrators must lead and be sensitive to the community's needs and preferences. As the intermediaries between the lay community and the professional staff, the administrators must at any given time be both an agent of change and a protector of the status quo.

School administrators must balance their concerns so that they can be sensitive to each constituency's interests as they protect the integrity of the schools they lead. School administrators must be responsive to their communities' values, but they must not do so at the expense of the integrity of their schools. Sensitivity and responsiveness must come with a devoted obligation to the continued development of an excellent public education in our democracy.

By examining the actions of the religious community's leaders and the actions of the public school's leaders, we can understand that Cowan is ultimately about the continued integrity of the public schools in our society. The various aspects of the case all combine to direct our attention to this deeper issue that Cowan presents to us. We must not be satisfied in discussing only the readily apparent issues of Title VII, the freedom of speech provision in our constitution, and the appropriateness of promoting self-esteem in the public school curriculum.

As for the question posed in the title of this paper, Did the school district or teacher win?, our answer is: "It depends." If win means who won the verdict on the Title VII religious discrimination claim and the First Amendment free speech claim, then Cowan won. If win means did the school district succeed in not rehiring Cowan in 1993 soon after complaints about the Magic Rock Letter arose, then the school and the religious right community won. In agreement, Lisa Van Amburg, Cowan's attorney, calls the results of the lawsuit a "hollow victory" due to the absence of the reinstatement of her client. "The justice system woefully let her down."[29] In the larger sense of the word win, it is our opinion that no one won and everyone lost in Cowan. Superintendent Tice has now retired; Principal Cogdill maintains her job; Leslie Cowan works at a gas station; and in the summer of 2000 the chilling effect of the religiously intimidating environment was still present in Strafford.[30]

IX. ENDNOTES

1. No. 94-3217-CV-S-4, 1996 U.S. Dist., (W. Mo. Dec 12, 1996), 140 F. 3d 1153 [125 Ed. Law Rep. [613]] (8th Cir. 1998).

2.. The facts are derived from various court documents, including the judges' published and nonpublished decisions as well as the parties' briefs and motions to the courts, the supervising principal's formative and summative reports, newspaper articles, the plaintiff's original letter to her students, the telephone conversations with the leading lawyer for each side of the case, and the telephone conversation with the plaintiff.

3.. Cogdill testified that she had not seen the magic rock letter until the parent showed it to her. However, Cowan testified that she had given a copy to Cogdill before Cowan sent it home to the parents and previously had given Cogdill a copy of the same letter because she had sent it home in 1991, too.

4.. Cowan's Complaint in the United States District Court, Western District of Missouri, Southern Division, June 14, 1994, paragraph 23.

5.. Id. at paragraph 22.

6.. BOE Brief to Eighth Circuit, at 8.

7.. 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed.2d 268 (1989).

8.. 429 U.S. 274 (1977).

9.. 393 U.S. 503 (1969).

10.. 461 U.S. 138 (1983).

11.. Price Waterhouse, 490 U.S. at 258.

12.. Id.

13.. Judge's Order of Dec. 12, 1996 at 8, quoting from Standley v. Chillhowee R-IV School Dist., 5 F.3d 319, 321 [85 Ed. Law Rep. 1010]] (8th Cir. 1993).

14.. Personal telephone conversations with Cowan's and the School District's lawyers.

15.. Pickering v. Bd. of Edu., 391 U.S. 563 (1968); Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969).

16.. Judge's Order, June 14, 1995 at 8.

17.. See Miles v. Denver Public Schools, 944 F.2d 773 [69 Ed. Law Rep. [1060]] (10th Cir. 1991) for teacher disciplined for improper classroom speech.

18.. Cowan, 140 F.3d at 1158.

19.. Id., footnote 3.

20.. Jordana Hart, "The Test of a Great Teacher," The Boston Globe, July 13, 1998, at B1.

21.. Cogdill's notes, initialed by the superintendent, of the conference on August 14, 1992, between Cogdill and Cowan.

22.. See Barbara B. Gaddy, T. William Hall, and Robert J. Marzano, School Wars: Resolving Our Conflicts over Religion and Values (1996); Sara Diamond, Not by Politics Alone: The Enduring Influence of the Christian Right (1998); Fritz Detwiler, Standing on the Premises of God: The Christian Right's Fight to Redefine America's Public Schools (1999); June Edwards, Opposing Censorship in the Public Schools: Religion, Morality, and Literature (1998); Clyde Wilcox, Onward Christian Soldiers?: The Religious Right in American Politics (1996); and Catherine A. Lugg, "Reading, Writing, and Reconstructionism: The Christian Right and the Politics of Public Education," Educational Policy (in press for November 2000).

23.. Detwiler, supra, at 2.

24.. See in particular E. E. Evans-Pritchard, "The Morphology and Function of Magic: A Comparative Study of Trobiand and Zande Ritual and Spells" in Middleton, supra. (That chapter is a reprint of an article from The American Anthropologist 31, 1929: 619-41.); see also Firth, supra and Malinowski, supra.

25.. Judge's Order of December 12, 1996 at 9.

26.. One point about the Magic Rock Letter is now in order. We have seen no comments about the spelling error in the letter, namely you instead of your in the second sentence of the second paragraph. There also are punctuation errors in the letter. In its published opinion the appellate court corrected some errors without even noting them. The silence is odd in light of the opposition to the letter, including parental complaints about errors Cowan had made in correcting her students' papers. We, therefore, expected to find some mention of Cowan's errors in her letter to her students as further evidence to support the BOE's claim of Cowan's poor performance.

27.. See Rosemary C. Salomone, "Struggling with the Devil: A Case Study of Values in Conflict," 32 Georgia Law Rev. 633 (Winter 1998) for a somewhat different concept of what these cases are about. Her article precedes the district court decision in Altman v. Bedford Central School Dist., 45 F.Supp.2d 368 (S.D.N.Y 1999), which is the related legal opinion.

28.. For a case involving a home-schooled student (for religious reasons) who sued a board of education for permission to attend high school part-time see Swanson v. Guthrie ISD I-L, 135 F.3d 694 [123 Ed. Law Rep. 1087]] (10th Cir. 1998). Note also that in Colorado City, Arizona, a church leader of a polygamist religious group ordered his followers to teach their children at home. Thus, the public school enrollment is expected to decrease from 1,000 to 500 students at the start of the 2000-2001 school year. "Leader of Polygamists Orders Home-Schooling," The New York Times, August 6, 2000, at 14; Catherine Gewertz, "Student Exodus Hits Schools in 2 Towns," Education Week, September 13, 2000, at 1. .

29.. E-mail correspondence with Lisa Van Amburg, August 8, 2000.

30.. Telephone interview with Leslie Cowan on August 1, 2000.

LITIGATING THE FUTURE OF FUNCTIONAL BEHAVIORAL ASSESSMENT

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Litigating the Future of Functional Behavioral Assessment

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Section 614(d)(2)(B) requires the IEP team "in the case of a child whose behavior impedes his or her learning or that of others, to consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." Therefore, when misconduct occurs a functional behavioral assessment could be conducted and determinations made as to whether the students' current program is appropriate or the student would benefit from changes in his or her program.

Disciplinary change of placement occurs when a child is removed for more than 10 consecutive school days or when the child is subjected to a series of removals that constitute a pattern and cumulate to more than 10 school days in a school year.

Under the new regulations functional behavioral assessments and behavioral intervention plans will only be required within 10 business days when the child is first removed for more than 10 school days in a school year and whenever the child is subjected to disciplinary change of placement. In other subsequent removals during the school year a child who has had a functional behavioral assessment and has a behavioral intervention plan, the IEP team members review the plans and its implementation in light of the child's behavior. They may do this without a meeting and only meet if one or more of the team members believe that the plan needs modifications.

Therefore, conclusively it is being stated that not later than 10 business days after removing a child for more than 10 school days, the district must convene and IEP team meeting and conduct a functional behavioral assessment and implement a behavioral intervention plan. If a child is removed for the 11th cumulative day in a school year and has a behavioral intervention plan, the school district must convene the IEP team, either before but not later than 10 business days after removing the child for more than 10 school days, to review the behavioral intervention plan and modify as necessary.

The Department of Education does not believe that a functional behavioral assessment is required if a child with a disability is removed from his or her placement for 10 school days or less and no further disciplinary action is contemplated. However, it would be prudent for the school district to review as soon as possible the circumstances that led to the child's removal and consider what adjustments can be made within the classroom or program, or whether the IEP team needs to meet and address possible changes or consider a functional behavioral assessment and behavioral intervention plan.

In examining the potential legal cases and precedents that may be cited in a case involving functional behavioral assessments and behavioral intervention plans, one first would look at Mills. Vs. Board of Education of District of Columbia. In Mills vs. Board of Education of District of Columbia (1972) the court ruled that the District of Columbia Board of Education violated the due process clause of the 14th amendment in denying children who had been labeled behavioral problems, mentally retarded, or emotionally disturbed an education. The court pointed out that "22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children, and perhaps as many as 18,000 of these children are not being furnished with programs of specialized education" (348F. Supp.86, D.D.C1972). The court in their decision made it clear that due process of law required a hearing before children who had been labeled behavioral problems, mentally retarded, or emotionally disturbed could be suspended or expelled from regular schooling in publicly supported schools. Additionally, the court recognized that many children were being excluded entirely from school because they were identified as having a behavior problem. The ground -work for the federal legislation that followed was laid in this case, henceforth IDEA.

Consideration of procedural due process and disciplinary issues has its foundation in Goss v. Lopez, 1975. Nine students who had been suspended from an Ohio public school for up to ten days without a hearing brought action stating that the Ohio statute permitting such suspensions was unconstitutional and deprived students of a hearing thereby violating procedural due process rights under the 14th Amendment. The heart of the argument made by the Court looked upon substantive due process in terms of "property interest" that the students had regarding their education. The "liberty" interests of the students were implicated because the misconduct charges, if sustained and recorded could potentially damage the students' future. The Court concluded that a ten day suspension could not be considered de minims and that procedural due process required that a student be given oral or written notice of the charges against him, an explanation of the evidence and the opportunity to present his side of the story. The

Court determined that students who imposed a continual danger may be immediately removed. As the Court stated "we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead, we have imposed requirements which are, if anything, less than a fair minded school principal would impose upon himself in order to avoid unfair suspensions (419 U.S. 565, 95S.CT 729). The issue of procedural due process in Goss v. Lopez serves as a cornerstone to what follows.

IDEA states that during the pending of administrative and judicial proceedings, a special education child is to remain in his or her current educational placement. This provision known as the "stay put" provision has given rise to significant litigation and the Supreme Court in Honig vs. Doe (1988) gave significant guidance to the issue. The Court stated that a school district may suspend a child who is dangerous to him or herself or others for up to ten days without violating the "stay put" provision. Specifically the Court stated "where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days. This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down," period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10 day respite gives school officials an opportunity to invoke the aid of the courts," (484 U.S. 305, 108 S.Ct. 592.)

As a result of this and subsequent decisions made clarifications in the 1997 IDEA amendments occurred. The clarifications appeared to make it clear that schools may provide interim placements of suspend students up to 10 school days a year, that is a total of 10 school days in year, without a due process hearing. Students carrying weapons or knowingly possessing illegal drugs may be assigned to an alternative setting for up to 45 days. These removals may be applied to the disabled student provided the same is provided to the non-disabled student. An additional amendment is the procedure for functional behavioral assessments and behavioral intervention plans, which as previously stated, are to be done on the 11th day of suspension and not required if the suspension or change of placement is for 10 days or less. In considering litigation regarding functional behavioral assessment it can be inferred that the courts would uphold this interpretation and in a case where the suspension was for less than 10 days and a functional behavioral assessment not conducted, it seems that the courts would find that the school or educational facility fulfilled the IEP requirements. However, one could speculate that even with a suspension of change of placement of less than 10 days where a functional behavioral assessment was not conducted, the parents could question the disciplinary action and make a potential case for the fact that the child's suspension was due to his or her disability but could not be properly ascertained since a functional behavioral assessment was not conducted.

To date questions regarding an FBA or BIP have gone as far as a state's hearing officer and no decision, at this point, has been challenged. Hearing officer's decisions have varied from deciding that the school had adequately performed an FBA to stating that observations alone do not constitute an FBA as viewed in the Ossea Area School in Minnesota in 1999. Here the parents of an eight-year-old student with sensory integration problems, speech deficits, and behavioral difficulties requested that the school district conduct an FBA seven months into the school year since the student had been disciplined many times with time-outs and physical restraints. The student's IEP team conducted a one-hour observation of the student and noted that the child's behavior worsened when tired. The IEP concluded that the observation gave them the necessary information needed to determine whether the child's program needed to be changed. The parents found the observation to be inadequate and went through administrative processes. The hearing officer ruled that the observation did not constitute an appropriate FBA and this caused the child to be denied a proper FAPE for both first and second grade. The hearing officer stated, "a single classroom observation—approximately one hour in length can not be considered sufficient to constitute a functional behavioral assessment. The hearing officer ordered the district to pay for an intensive summer program. (Independent Sch. District, No. 270, Ossea School: 30 IDELR 645).

In another case in the Ossea area of Minnesota the school district suspended a student with oppositional defiant disorder for ten days due to a violation of the district's weapon policy by bringing an unassembled paintball gun to school. The district held a manifestation hearing and concluded the student's bringing the paintball gun to school was not a manifestation of his disability. The district expelled him and transferred the student to a school for students with emotional and behavioral disorders. The IEP had neither conducted an FBA nor developed a BIP. The hearing officer ordered the district to allow the student to return to school and to conduct an FBA within 10 days of the student's return.

In a similar situation a California hearing officer ruled that a student with a learning disability facing expulsion for smoking marijuana on school grounds had to return to school because the IEP team failed to conduct an FBA. (William Hart Union High School District).

Although it may appear as though there is no clear guidance regarding an FBA it is evident that the IDEA Reauthorization meant for school districts to be proactive and use up-front measures in order to prevent behavior problems. Behavior problems can be greatly diminished, even completely avoided, if teachers, school personnel, and administrators have knowledge and expertise to provide appropriate behavioral interventions and programs. The inclusion of an FBA in the IDEA Re-authorization, although left unclear, is surely a proactive measure for school districts to intervene as early as possible with regard to behavioral issues among children with disabilities. The lack of knowledge regarding completing an FBA is an ignorance that the courts will not allow school districts to hide behind. Therefore, it is imperative that school districts become proactive and provide pre-service and in-service training for faculty and other school personnel immediately. Additionally, school districts need to develop a plan for a continuum of FBA options.

A minimal standpoint to begin would be the adoption of an observation form for an FBA evaluation. Mary Quinn, Ph.D, Director of the Positive Education Program at the Center for Effective Collaboration and Practice in Washington D.C. has created an Antecedent-Behavioral-Consequence chart that she recommends all school use as a beginning baseline. The Antecedent-Behavioral-Consequence chart requires the IEP team member doing the observation to record the student's name, date of observation, time, class period, and the activity that the student is engaged in. If an inappropriate behavior occurs, including the behavior that caused a removal from school, the observer needs to write down the antecedent, the behavior, and the consequence. Dr. Quinn recommends that the student be observed several times using this chart as a consistent means of recording the information.

Utilization of the Antecedent-Behavioral-Consequence chart in combination with a standardized functional assessment scale would be the most comprehensive methodology a school district could adopt for conducting all An FBA. Kay Hodges, Ph.D (1995) developed standardized functional assessment scales for all school age children. The Preschool and Early Childhood Functional Assessment Scale (PECFAS) and the Child and Adolescent Functional Assessment Scale (CAFAS) are intensive rating scales that score the childs' behavioral problem on a scale from minimal or no impairment to severe impairment. The scale requires observing the child in school, home, and community. It ascertains the child's behavior toward others and self as well as determining the child's moods, cognitive, and communication skills. Administration of these scales requires a trained rater. The rater may be the IEP team leader, a psychologist, school social worker, counselor, or specially trained teacher. This would require that school districts pay to train individuals within their district to administer these scales. Given the intent of IDEA Re-authorization regarding an FBA it would seem prudent for school districts to invest the time and money to train personnel for this task.

School districts would do well to follow some simple rules when conducting functional behavioral assessments:

1. Conduct an FBA when a child has been suspended for or has reached 10 days of school suspension. Ideally, an FBA should be conducted before suspension reaches this point.
2. Conduct an FBA upon a parent's request. If a parent requests an FBA anytime during the school year the school district must conduct one.
3. Secure parental consent for an FBA. Although the student had a full evaluation to qualify for special education, it would be wise to secure consent for an FBA if it was not done with the initial evaluation.
4. Decide which team member/s will perform the FBA. IDEA has no specific requirement regarding this although some states may have more specific rules. It

behooves school teams to make this decision ahead of time and to assign a coordinator for this process.

5. Use rating scales and checklists.
6. Interview the teachers involved with the student, the parents, and the student if possible.
7. Observe the student in a setting where the behavior is likely to occur.
8. Compare the data, analyze the information and try to explain the behavior and develop a BIP based on this.

In conclusion, a FBA is still a tenuous and unclear arena within the IDEA Reauthorization and the only decisions that we can glean towards are cases that have gone before hearing officers. Only time will tell how the courts will decide what is meant by a FBA and what is required by school districts. However, it seems evident that the intent of the IDEA Re-authorization was for school districts to become proactive regarding behavioral misconduct of children with disabilities.

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Appendix A

Antecedent-Behavioral-Consequence Chart

Student's Name

Observation Date

Observer

Time

Activity

Class Period

Antecedent

Behavior

Consequences

THE WALL OF SEPARATION DOCTRINE IN THE REHNQUIST ERA: THE LESSONS OF JUDGE LEARNED HAND

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THE WALL OF SEPARATION DOCTRINE IN THE REHNQUIST ERA: THE LESSONS OF JUDGE LEARNED HAND

> If, in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.
>
> George Washington, Farewell Address, 1796

George Washington in the statement above urged his countrymen to be vigilant against usurpation of authority. Inspired by that passage, Judge W. Brevard Hand in 1983 wrote the dissenting opinion in the Alabama prayer case (Jaffree v. The Board of School Commissioners of Mobile County (1983) and repudiated the entire body of case law surrounding the Establishment Clause of the First Amendment since Everson v. Board of Education (1947). In Black's decision, the Supreme Court summarized its exegesis of Establishment Clause doctrine citing the precedent of Reynolds v. United States (1989): "In the words of Jefferson, the clause against establishment of religion by law was intended [emphasis supplied] to erect 'a wall of separation between church and state.'" Black also affirmed that: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. " p. 18). It was this "precedent" of Jefferson's letter to the Danbury Baptists to establish an absolute wall of separation between church and state that caused Judge Rehnquist to question this "misleading metaphor" as "bad history" in Wallace v. Jaffree (1995). However, it was not Rehnquist, but judge W. Brevard Hand, who first challenged Justice Black's constitutional theory in relation to both separation doctrine and the doctrine of incorporation of the First Amendment through the Fourteenth Amendment which has drastically reconstituted the principle of federalism in the United States.

This paper examines what appears to be an improper expansion of jurisdiction which has occurred in the Court's reinterpretation of the scope of the Fourteenth Amendment since Everson. In Jaffree, Judge Hand pointed to a significant judicial, paradigmatic shift that has alerted the Rehnquist court to a form of interpretation that has taken a constitutional amendment that provided citizenship to former slaves and applied it to prohibit religious activities in the schools and public affairs of states and local communities. We recall that the Fourteenth Amendment, ratified in 1868, guaranteed State citizenship to recently emancipated slaves. It is not surprising, however, when one understands the distinct purposes of these two Amendments, the First and the Fourteenth, that no previous Court had ever coupled them until the Everson court in 1947. Justice William Douglas explained that although the Court had incorporated a portion of the First Amendment into the Fourteenth Amendment as early as 1940 in Cantwell v Connecticut, it was not until Everson in 1947 that the Establishment Clause itself was incorporated into the Fourteenth. . William Douglas in Walz v. Tax Commission (1970) described the problem of coupling the Fourteenth Amendment with the Bill of Rights, and like Hand, argued that the Court had not only removed State sovereignty over many areas, but it had also created an American revolution which...

> ...involved the imposition of new and far-reaching constitutional restraints on the States. Nationalization of many civil liberties has been the consequences of the Fourteenth Amendment, reversing the historic position that the foundations of those liberties rested largely in State law....And so the revolution occasioned by the Fourteenth Amendment has progressed as Article after Article in the Bill of Rights has been incorporated in it and made applicable to the States (Justice Douglas dissenting, p. 703.

Judge Hand is not alone among jurists and other constitutional theorists in alerting us to the profound implications to federalism in the Everson decision, notable not only for its sudden introduction of the "separation" rhetoric but for its use of the Fourteenth Amendment to limit local religious expressions.

There is a tide in the affairs of men that has clearly turned against the high and impregnable wall of separation. Modern courts have been as much concerned about freedom from religion as freedom of religion. Today, however, there is a growing perception of a weakening of religious or moral influence in our national life: "We are witnessing a revival of the theory and practice of religion as part and parcel of our sociopolitical dynamics..."(Abraham, 1987, p. 17). Given the current issue of federal and state aid to sectarian institutions, federal control over states, the lack of academic freedom in universities, culture war involving creationism and evolution, prayer in schools or morality taught in the public schools, as well as the recent explosion of state-level educational voucher initiatives, policymakers (especially since the Columbine incident) are asking: "Do we pay a price for maintaining that separation?" Some argue that we do and that the nation ought, therefore, to support and encourage religion as a means of moral restraint. Does the Constitution actually prevent this? What principle of law should we follow?

When it comes to federal or state aid to sectarian schools, where exactly do the courts stand on separation doctrine today, and what does the doctrine of separation of church and state really mean? How valid, secure, or even "firmly rooted" are the judicial precedents that have established this great body of case law? More importantly, what has been the effect of these decisions with regard to separation doctrine and its relationship to the Fourteenth Amendment on society? Have we given too much power to the federal judiciary in civil liberties cases?

So ambiguous is the law in church/state cases today that, in an increasingly pluralistic society, Americans are questioning the soundness of an absolute wall of separation and the power of the federal government to enforce it. They look to vouchers and various forms of state and federal aid that involve sectarian institutions to experience even greater religious expression. Americans are vexed by the present state of religious pluralism, misunderstand the new directions the Supreme Court appears to be taking to bring down the wall of separation during the Rehnquist era, and are clearly confused by the frequent lack of consensus and conviction of the Court, to say nothing of recent challenges to federalism.

Lay as well as professional attitudes run the gamut from "much ado about nothing" to simply "abandon the field." Others argue that in the years since 1947, court decisions have become ever more confused and contradictory, resulting in "...an intellectual shambles: one confused and convoluted decision, requiring a yet more confused and convoluted explanation or modification" (Public Interest, Fall, 1979). Rather than continue to struggle with the Sisyphean task of trying to patch together the blurred, indistinct, and variable barrier of Lemon v. Kurtzman (1971), some would resurrect the high and impregnable wall. Antonin Scalia, noted that the "Supreme Court's jurisprudence concerning the Establishment Clause in general, and the application of that clause to governmental assistance for religiously affiliated education in particular, is in a state of utter chaos and unpredictable change." (Scalia cited in Marcus, 1985, p. 17). Given the disarray of Establishment Clause jurisprudence for at least the past two decades (McCarthy, 1999), one can find strong support in the Supreme Court case law for both sides of the separation issue.

Today, a revisionist court is seeking to provide new direction for church/state jurisprudence by altering the terms of the specific battleground of the meaning of the Establishment Clause and by recurring to its founding history. Many skirmishes and irresolutions havve resulted over the Supreme Court's engagement over the issue of the creation of the First Amendment and the intent of its framers. Very simply, Chief Justice Rehnquist, taking a cue from Judge W. Brevard Hand's historicism, looks to those precedents and sources frequently ignored in American history that favor government encouragement to religion. Others in the secular camp see Jefferson and Madison as seminal Framing influences at the time of the First Congress and teach that a complete separation of church and state is necessary for the health of the new republic. The view that the Establishment Clause requires only a "secular outlook" usually accompanies this position on the present Court.

Several new cases have also raised the state/federal sovereignty issue once again which could have major impact on liability in entitlement programs in public schools. Recent decisions of the Supreme Court conceding to a thin majority over the past five years, have scaled back the power of Congress to apply federal legislation to the states, attempted to clarify the sovereign status of the states in our federal system and provoked vigorous debate about the concept of federalism. I refer specifically to government insistence of standardized tests on evolution imposed upon school boards in that state, Alden v. Maine (2000), and U.S. v. Lopez (1995). Similar rulings of the Supreme Court implicating federalism "...have prompted states to raise Eleventh Amendment immunity claims in all kinds of lawsuits, including those that led to the Supreme Court's rulings limiting fair-labor-standards and age-discrimination laws from being applied to the states" and Title IX of the Education Amendments of 1972 prohibiting sex discrimination in educational programs receiving federal funds (Education Week, February 23, 2000, p. 30).

Recent cases involving federalism have addressed the conflict over basic principles. Chief Justice Rehnquist, has spoken out specifically about the federalization of the Bill of Rights. In U.S. v. Lopez (1995), the U.S. Supreme Court case involving a Texas 12th grade student who brought a gun to school and was charged with violating a federal statute, Judge Rehnquist recognized the principle that what the Constitution intends, the court obeys. In this case his strict reading of Original Intent dovetailed with the political views of the Court majority regarding an interpretation of federalism.

Faults and Fissures in the Wall of Separation Doctrine

Since Everson v. Board of Education of Ewing Township (1947) cracks and fissures in the wall of separation doctrine have increased. In New York, a 5-4 holding in Liberty v. Regan (1980) some doubt was cast upon Blackmun's above assertion. That doubt was reinforced by the Court's 5-4 holding of a Minnesota law permitting state-tax-paying parents to deduct educational expenses for their children attending parochial schools and other subsequent cases that have questioned the absolute wall theory (Mueller v. Allen, 1983). Other decisions since that time appear to constitute a "no" to more accommodation. Nevertheless, fifty years of jurisprudence toward school choice has culminated in the landmark case, Jackson v. Benson (1999) where the Wisconsin Supreme Court ruled that the amended Milwaukee Parental Choice Program (MPCP) was not in violation of the Establishment Clause of the First Amendment to the U.S. Constitution or the religious establishment provisions of Article I, Section 18 of the Wisconsin Constitution. This case has sparked a rash of recent litigation pertaining to similar voucher programs in state supreme courts throughout the United States. The ongoing litigation has resulted in several discrete legal rationales and conflicting rules in state courts over the constitutionality of voucher programs involving aid to sectarian schools.

Establishment Clause Jurisprudence: Aid to Religion

On the matter of aid to religion, the Supreme Court's recent position on governmental aid to parochial schools and the original constitutional intent point to a judicial stance that is favorable toward voucher systems. An emerging no preference theory of jurisprudence similar to Judge Learned Hand's, is now finding its legal basis in natural and common law philosophy, looking to "accurate history" and older, well-established precedents that had been ignored. When aid to sectarian schools is considered with reference to federal funding, it is now relatively uncertain whether any states other than Missouri and Virginia would prohibit sectarian schools from participating in a choice program. In Witters v. Washington Department of Services for the Blind (1986), a unanimous Supreme Court relied on the three-part purpose-effect-entanglement test to contend that a Washington State program for vocational aid to the handicapped had a clearly secular purpose.

The Supreme Court will not accept any attempts by states to directly support religious schools or teachers, but it will attend primarily to the actual purpose served by any legislative plan that directly or indirectly includes religious schools. These cases provide strong judicial precedents for an educational policy that emphasizes the needs and rights of individuals (including parents and family), as well as overall public purposes rather than educational institutions. Does the inclusion of sectarian schools in voucher schemes violate the Establishment Clause? The case of Agostini v. Felton (1997) which involved an Establishment Clause challenge to a school-aid program, represents one of the Court's most recent attempts to devise a general framework for approaching questions concerning neutral school-aid programs. However, a more recent Supreme Court case involving federal aid to sectarian schools, Mitchell v. Helms (2000) in reviewing Chapter 2 of the Education Consolidation and Improvement Act of 1981 which channels federal funds via state educational agencies (SEA's) to local educational agencies (LEA's) and which in turn lends educational materials and equipment to many Catholic and otherwise religiously affiliated schools, has brought a new focus on the meaning of government "neutrality" to case law. In this case the Rhenquist court addressed the violation of the First Amendment's Establishment Clause and overturned decisions by inferior courts which had relied upon the primary effect test of Lemon v. Kurtzman (1971), Meek v. Pittenger (1975), and Wolman v. Walter (1977) citing criteria developed in Agostini (1997) where the Court approved a program under Title I using three primary criteria for determining a statute's effect, i.e. if it (1) results in governmental indoctrination, (2) if it defines its recipients by reference to religion, and (3) if it involves excessive entanglement. Justice Thomas, joined by the Chief Justice, Justice Scalia, and Justice Kennedy, concluded in Mitchell v. Helms (2000) that Chapter 2 as applied in Jefferson Parish, is not a law respecting an establishment of religion because proof of establishment depends on whether any indoctrination occurs that could be reasonably attributed to governmental action. The court concluded that

> Such an incentive is not present where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis (p. 9).

Thus the issue is not divertibility, but whether the government aid itself has an impermissible content. Since governmental indoctrination of religion had not occurred, Meek and Wolman were overruled. Agostini was relied upon as a precedent because this case addressed the issue of whether the government itself acted with purpose of advancing or inhibiting religion and whether the aid itself had the "effect" of doing so. The new concept of "neutrality," however, is in tension with earlier precedents rooted in the assumptions of Everson. In considering the purposes of government, it appears that the court has now adopted the no-preference theory of Judge Learned Hand in Jaffree, a judicial theory also recently used in affirmative action cases which affirms an older natural law principle of equality before the law. Here is the new definition of "neutrality," taken from the reasoning of Judge Thomas in Mitchell:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and a-religious are

> all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government" (p. 5).

Judge Learned Hand's No Preference Doctrine in Theory and Practice

Regarding both separation and incorporation doctrine, Learned Hand assumes a non-preferentialist position and asks us to question why the Supreme Court in Everson departed so abruptly from legal and constitutional tradition and principles after 150 years of precedents in case law by announcing two revolutionary principles of constitutional construction. First Black arbitrarily announced that the establishment clause erected a "wall of separation" between church and state that prohibited the states from giving any aid of any kind, not merely to specific religious sects or denominations, but for the encouragement of religion generally. Secondly in the 1947 dictum, Justice Black held that the Establishment clause applied to the states and also prevented any aid to religion arguing that:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions (Black, 1947, p. 15).

In Jaffree v. The Board of School Commissioners of Mobile County, Judge Learned Hand argues that the founders never intended the First Amendment to require "neutrality" on the part of government between religion and irreligion, and, even more significantly, that the federal courts do not even have jurisdiction over cases involving prayer in the public schools of Alabama. Legal scholars and political scientists for years have endorsed Learned Hand's view and wondered why his own revolutionary challenges to orthodox wall of separation and incorporation doctrines embraced by modern courts have rarely been examined by jurists themselves. Says one constitutional lawyer and political scientist,

> To appreciate the significance of the Jaffree case, especially in relation to the federalism issue today, it is important to know that Judge Learned Hand is the first member of the entire federal judiciary to question the Supreme Court's jurisdictional claims over church-state relations in the several states and also the first jurist to challenge the application of the Bill of Rights to the states (McClellan , 1987, p. 43).

The fact is the Supreme Court itself has questioned incorporation doctrine, but only as it has affected criminal procedures. (See the dissents of Justices Harlan in Duncan v. Louisiana (1968) and Black in Adamson v. California (1947). Learned Hand, however, was the first jurists to argue that the practical consequences of this "new principle" of separation of church and state enforced by the United States Supreme Court through the doctrine of incorporation undermines the principle of federalism, leads to a concentration of power in the hands of a few individuals, and has led to a jurisprudence in modern times that encourages government to undermine citizens' claims to rights not given by government, but inherent in his nature. Jaffree cites years of precedents ignored by the courts since Everson and reviews impressive historical evidence and principles of government that have been consistently overlooked or ignored in previous establishment cases. His opinion, therefore, sheds light on the renewed federal debate in public school law cases involving a tug of war over states' powers implicating the First, Fourteenth, and Eleventh Amendments.

Razor-thin decisions over the years have suggested an erosion of Jefferson's "alleged" separation doctrine Lawyers and judges are clearly searching for new guiding principles. They are also reading once again the debates of the First Constitutional Convention over the inclusion of the Bill of Rights in the U.S. Constitution to rediscover who should have control over civil liberties, i.e. the states or the national government. Considering the establishment issue in the light of Jaffree, it is ironic to discover that the strongest allies of non-preferentialist theory are both James Madison and Thomas Jefferson themselves. Both took an anti-establishment view of religion in the Virginia case, but owing to their beliefs in natural law, consistently qualify absolutist doctrine in writings other than the Memorial and Remonstrance against Religious Assessments (1987)and An Act for Establishing Religious Freedom (1998) , and during their tenure of office as president of the United States. Neither Madison (a nationalist and federalist), nor Jefferson (a states'rights advocate and Anti-federalist) would have supported the federalization of the Bill of Rights, fearing a national establishment of religion. Other jurists like Judge Joseph Story and John Marshall, legislators in the nineteenth century, and modern constitutional scholars in the twentieth century have endorsed the same principles viewing constitutional construction from a different philosophy of jurisprudence than the contemporary courts, and because they take seriously the doctrine of original intent and the natural law and common law bases for the United States Constitution and Bill of Rights.

At the heart of the confusion and controversy over separation doctrine as well as incorporation is the philosophy of jurisprudence which is rarely debated or discussed. Such a discussion serves to heighten our appreciation of several important legal concepts: the doctrine of precedent and original intent, federalism, and natural law versus natural rights philosophy as it interprets the human being and his status before the law. Judge

Hand's Jaffree opinion, therefore, raises an alarming constitutional question. Have we come to a point in our jurisprudence that the first nine amendments as well as the Eleventh Amendment of our Constitution are being used by the Supreme Court to establish federal control over all civil and criminal rights disputes in the nation, the very result that the Bill of Rights was designed to prevent?

Judge Hand's dissent in Jaffree also addresses the problem of historical validity through precedent. He questions the absolutist position of the Court in 1947 basically unsupported by the language or intent of the Constitution where more than 150 years of legal precedents had allowed states to determine their own church-state relationships in accordance with their own state laws and constitutions under the protection of the Tenth Amendment. In doing so Judge Hand in Jaffree clarifies the dual purpose of the Bill of Rights: (1) to assure individuals that the federal government would not abridge freedom of religion, and (2) to assure each state that the federal government would not encroach upon state jursidiction in matters of all civil liberties. Hand opined that the First Amendment, like all the amendments in the Bill of Rights, was a guarantee to the individual and to the states equally, and he argues, like Madison in his proposed amendment to the First Amendment at the First Congress, that the First Amendment clearly indicated that the prohibition against religious establishment applied only to the federal government and that the states would retain exclusive control over church-state relations within their spheres of authority. Hand's exegis in this regard demonstrates in many respects that the First Amendment that finally evolved out of the First Congress' proceedings, "...was a stunning victory for states' rights" (McClellan, 1987, p. 48). This legacy of safeguarding civil liberties through the Tenth Amendment has been passed on to the present Supreme Court when Justice Rehnquist wrote in defense of federalism in U. S. v. Lopez (1995) that:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, the power delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain the State governments are numerous and indefinite...This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties...A healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front....
>
> Under the theories that the Government presents in support of 922(q), it is difficult to perceive any limitation on federal power...Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that a Congress is without power to regulate (U.S. v. Lopez, 1995p. 32).

In his opposition to the federalization of the Bill of Rights, Judge Hand particularly called attention to the usurpation of judicial power that has occurred owing to the doctrine of incorporation. Jaffree thus challenges us to review the present courts' confused and tenuous claims on both incorporation and wall of separation theories and particularly to anticipate an accurate portrayal of history and ideas. In reading this opinion, we are led to ask: while stare decisis may bind courts as to matters of law, does it not also bind them to matters of history? To answer this questionI will: (1) review briefly the present confused state of jurisprudence and legal theories that have emerged in church-state law; (2) re-examine legal theory surrounding church/state relations at the time of the founding looking at Original Intent; (3) revisit the ratification struggle for a bill of rights focussing primarily on Madison's and Jefferson's views on federalism in relation to civil liberties, and (4) examine the precedents before and after the adoption of the Fourteenth amendment, focusing particularly on the fate of the Blaine Amendment.

The purpose of this paper is to illustrate that the revisionism of the present Supreme Court in church/state law requires a more careful look at precedent and historical record for an accurate interpretation and portrayal of the Framers intent. Rehnquist's phrase "bad history," does not necessarily mean that this Chief Justice is living in massive denial and self-deceit, but only that, as Learned Hand pointed out, Virginia history, which reveals separationist intent, is not the only history, and that Madison and Jefferson may not be the only founders to consult in matters of constitutional interpretation and construction, even if we do judge them correctly. I wish to show in this presentation, therefore how Hand's dissent in Jaffree has challenged the modern Court's self-proclaimed infallibility on the question of both religious establishment and the doctrine of incorporation, and in doing so, has inspired new principles for judicial leadership. The following outline will be followed in this presentation:

I. Overview of Church/State Case Law
    A. Doctrine of Separation
    B. Doctrine of Incorporation
II. The Legal Bases of Constitutional Construction
    A. Natural and Common Law Foundations
    B. Legal Positivism
III. Review of Legal Theories Involving State and Federal Aid to Schools
    A. Strict Separation--no aid theory
    B. Government Neutrality Theory
    C. Governmental Accommodation Theory
    D. Non-preferential Theory
IV. Common Law and Constitution
    A. Blackstone on Precedents and Original Intent
    B. The Story-Jefferson Feud over Christianity and Common Law
V. Federalism and the Establishment Clause
    A. Review of Principles and Constitutional Construction

B. Edward S. Corwin's Definition of Liberty in the Establishment Clause

VI. Judge Hand's No Preference Doctrine in Theory and Practice
  A. Original Intent of the Framers
  B. The Ratification Debates
  C. Legal Precedents Before and After Incorporation
  D. The History of the Blaine Amendment

VII. Civil Religion and Constitution
  A. The Concept and Elements of Civil Religion
  B. Benefits and Disadvantages

A measure of accommodation, even an increased one, has occurred with a large majority of America's citizenry probably going along. The battle has recently escalated with generalized financial assistance to nonpublic primary and secondary schools and will continue to engender a firestorm of controversy unless new guiding principles are established. The on-going separationist-accommodationist controversy defies facile analysis or resolution, and the incorporation controversy also does not lend itself readily to any kind of authoritativeness. This presentation, however, invites new avenues for discussion, especially since the three-pronged Lemon test of constitutionality has become, for all practical purposes, less tenable for our modern Supreme Court.

As the above outline indicates, some thought will be given in this presentation to the American legal tradition utilizing the writings of Blackstone and particularly Judge Joseph Story's Commentaries, whose argument on whether Christianity is part of the common law was generally accepted at the time--over Jefferson's protestations and Lockean view of natural rights which have greatly encouraged legal positivism in modern times. Largely owing to an interpretation of Jefferson's natural rights philosophy, legal positivism as it has been practiced is a peculiar combination of liberalism with a natural right of autonomous selfhood with little regard for Original Intent. As Leonard Levy writes: "We are not bound by the wisdom of the framers; we are bound only to consider whether the purposes they had in mind still merit political respect and constitutional obedience"(Levy, 1987, p. 91). With the creation of new rights in our own time (Berns, 1957), we have noted that so long as rights are assigned or interpreted on the basis of the primary goods of human selfhood, they seem to be limitless, constrained only by extrinsic application of public power from the bench or government. Even John Stuart Mill in On Liberty (1965) regarded abstract rights as a nuissance. Constitutional theorists like Michael J. Malbin (1978), James McClellan (1971), Charles Warren (1926), Robert Cord (1982), and Edward S. Corwin (1951), to name a few, however, recognize that in American constitutional law, natural law and natural rights have an honorable ancestry and want to refurbish it. What Hand makes clear in Jaffree is that the founders, while espousing separationist doctrine, did not advocate an absolute wall of separation, nor did they pit natural law reasoning against inherited institutions like churches. They generally believed that natural principles of justice are known by attending to collective experience in institutions of all sorts in addition to churches, common law, and the frame of civil institutions of self government. All of these resources in society comprise what some historians now refer to as "civil religion" in the United States (Poelvoorde, 1987, p. 141-167). Judge Story, the author of Commentaries on the Constitution, believed with James Madison and others, for example, that "an establishment of religion" forbade only the federal establishment of a national denomination: "Any attempt to level all religious and to make it a matter of state policy to hold all in utter indifference would have created universal disapprobation if not universal indignation (Story, 1833, p. 726).

At least one tribute to Judge Learned Hand's accommodationist theory, is that in Jaffree we are invited to consider a more balanced and less subjective jurisprudence. In Adamson v. California (1947), Justice Frankfurther captured the same spirit of revisionism recalling also Blackstones's jurisprudence and the importance of the Original Intent doctrine. Concerning the issue of selective incorporation, Frankfurter observed that if the criteria for selecting which amendments "...commend themselves to individual justices as indispensable to the dignity and happiness of a free man" are nothing but the private philosophical opinions of the Court , then "we are thrown back to a merely subjective test" (p. 65). But, he went on to say, "[i]n the history of thought, 'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight amendments for incorporation into the Fourteenth" (p. 67). Judge Frankfurter challenged a purely secularist and positivist philosophy of the modern court by advancing several criteria for adjudication in civil liberties cases that would address the issue of discrimination by government in matters of religion: (1) an "enduring reflection of experience with human nature"(p. 63), "the legislative history of the fourteenth Amendment"(p. 64); (3) what sensible and right-minded men do every day (p. 60); (4) the "fabric of law in the several states"(p. 67); and (5) judicial precedent. This eclectic approach suggests to the modern court that natural law principles of justice can be drawn from several sources that mutually reinforce one another as the basis for a new, more inclusive and responsible jurisprudence. In this respect, Jaffree marks an important turning point in American constitutional history while invigorating the legitimacy of a great body of scholarship that has been ignored by the Court.

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DNR ORDERS AND SCHOOL RESPONSIBILITY

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DNR Orders and School Responsibility

As medical issues loom larger in the public psyche by virtue of the broadening of concerns related to inclusion, questions are emerging coincident with those expressed by teachers of students with medical issues. In other words, more complex and different health care issues are emerging in regular classrooms and , indeed, in the school itself. Among those issues are the general lack of preparation of veteran regular and special education teachers to meet the needs of students who are medically fragile. Under the law as defined in cases such as *Sacramento City Unified School District v. Holland*, 14 F. 3d. 1398 (9th Cir. 1994), and *Oberti v. Board of Education of Clementon School District* (1993, 19 IDELR 908, 3^{rd} Circuit), if a student who is medically fragile could benefit from placement in a regular classroom from both academic and nonacademic (social) perspectives; if cost is not a problem; and if the effect on regular students and the teacher is not deleterious; placement of such students may be appropriate in regular classes.

IDEA and Section 504 establish some parameters for school and medical-like services for students with disabilities. Sate law and precedent may or may not refine "care" definitions for teachers and school health care providers , i.e. nurses.

Some case law defines the appropriateness of medical services and delimits the responsibility borne by schools in terms of provision of medical services and the liability for payment of associated costs. Among these cases are: *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), *Katherine D. v. Department of Education of Hawaii*, 727, F2d. 809 (9th Cir. 1983), *Detsel v Board of Education of Auburn Enlarged City School District*, 820 F2d 587 (2d Cir., 1986), and *Neely v. Rutherford Co. Schools*, 68 F3d 965 (6th Cir. 1995). The concept, "medical -like" services, which arises in the cases of *Katherine D., Tatro, and Detsel,* implies " if a student has established the need for the services to 1) overcome a functional limitation because of the disability, that will 2) enable him to benefit from special education, it is the state educational agency's (SEA) responsibly to ensure that the child receives the related services." (Arkansas State Department of Education Resource Guide p. 5).

When such services are provided, in compliance with the pertinent standards, the person providing the services, whether a nurse or a teacher has potential liability should there be resultant injury to the student or to other students. This situation is similar to the case of a school administrator or nurse who administers medication. There is potential liability for any reaction that may occur. Even though personnel such as nurses and teachers must have training to perform required procedures like catherization, it is true that school district personnel generally are neither qualified nor equipped to comply fully with physician's orders. Nonetheless, there is a duty to assist students in line within the established legal standards. With the inclusion of more medically fragile students in classrooms, school staff may be called upon to do just that, i.e. comply with physicians requests, and in relation to the most difficult of all medical decisions, do not resuscitate orders.

Liability and Duty of Care

The question of liability must be examined with the placement of such children for the duty of care extends beyond the day to day maintenance of the learning environment and beyond the provision of special services. If a DNR (do not resuscitate) order is on file for a child who is medically fragile, what is the liability of a teacher, principal or other employee who, in an emergency situation, does not comply with the order? Precedent predicated on such cases as *ABC School et al v. Mr. and Mrs. M. (1997 Mass. Super. Lexis 43), Brophy v. New England Sinai Hospital, Inc.* (398 Mass. 417, 1986), and *Superintendent of Belchertown State School v. Joseph Saikewicz* (373 Mass. 728, 1977) opens multiple issues which implicate, not only IDEA, but also FERPA, issues of competency, and liability. One may reasonably conclude that teachers and schools have a duty of care for their students and that reasonable teachers provide that level of care. In most states, statute or regulations would confirm that assumption. Issues that arise for consideration include parental versus school rights and responsibilities, the right to die, privacy concerns, student rights in the DNR decision, and impact on the educational environment.

Parental versus School Wishes in RE: Right to Die

Opinions in several cases in the past ten years have addressed the question of "right to die" and whether or not an individual can make that decision as well as whether or not others can make that decision for an individual who is no longer competent. In the well-known case, *Cruzan v. Director, Missouri*

Department of Health, 497 U.S. 261 (1990), the question of the right to refuse medical treatment raised issues applicable to the question of liberty with the finding affirming the state position that although Nancy Curzan was rendered incompetent by her accident " her parents lack(ed) the authority to effectuate such a request." (The request was to withdraw life support and to allow her to die.) While the facts differ from those of a student in a public school who has a DNR order, the question of how that order should be applied and by whom is as crucial in the school as it is for a person who is not competent and is in a health care facility. In fact, in the case *In Re: K.I.* , 735 A2d 448 (1999, D.C. App), the District of Columbia Appeals Court ruled that the "best interest of the child standard applied in cases involving minors (who) lacked and will forever lack the ability to express preferences regarding the course of their treatment."

The Cruzan case is somewhat different from the case of Karen Quinlan, (*In Re Quinlan* 70 N.J.10 (1976). In the Quinlan case, the state court concluded "the only practical way to present the loss of Karen's Privacy rights (in regard to the decision as to whether or not to remove her from life support) was to allow her guardian and family to decide." (at 42). This decision which preceded the Cruzan decision nonetheless points out the lack of consistency in legal standards as it relates to the right to die. In other words, the standard as to who can decide to remove life support and, by implication, who should and can decide on the implementation or non-implementation of a DNR order, may not be clear. In fact, this may vary from state to state. Under the law, a child who is a minor is generally considered not competent to make such decisions for himself or herself. (This appears to be true in all states save one.) While a medically fragile minor child in school for whom there is a DNR order maybe alert and aware, should some event of medical complication arise, an immediate decision must be made by school staff or school health providers as to what actions, if any, should be taken. The child, as a minor cannot be expected to make the decision. If the parent or guardian has expressed a desire for a DNR order and the order was signed by an attending physician, then the school is placed in a difficult position.

An additional issue is that absent state statutes or even an Attorney General's opinion providing direction, the immediate impulse of school personnel may be to attempt resuscitation inspite of the order and the will of the parents. On the other hand a choice may be made to honor the order, thereby allowing the child to die when, in fact this may be construed to be an illegal act in itself. In either situation, there may be liability for the individual and for the school even though in either situation the school may have acted in good faith.

This situation is of such concern that in the case *ABC School v. Mr. and Mrs. M* 1997 Mass. Supr. Lexis 43 (97-518) the court issued an order for the school to honor the terms of a DNR order. The school had sought to be allowed to refuse to honor the order. The school had a policy that required teachers to "use whatever mans to preserve and protect a child's life in the event of a crisis." (at 4) The parents argued that the right to refuse medical treatment for their minor child is constitutionally protected. It is fair to note that the DNR order did not preclude some intervention (treatment) but due to the child's fragile medical condition sought to prevent the administration of other potentially live saving interventions such as CPR. The school was ordered to comply with the DNR order and was not shielded from the possibility of liability in a suit for damages as a result of providing such emergency first aid. In fact, the court rejected the school's request that any action "taken by school personnel which violated the DNR orders would be in good faith ".

A question could be asked as to how the *ABC* decision comports with the *Tatro* case in which the court stated that schools "have continuing obligations to provide a certain degree of care and interventions." In a similar case in Lewiston, Maine, the teachers union actually requested that the school be released from the obligation to honor a DNR order.

Other School Cases

Consideration of the aforementioned cases and that of *Department of Education , State of Hawaii v. Katherine D.* 727 F.2d 809 (1983) leads to an understanding of the discomfort that school staff may have with some of the emergency health services that may be recommended for medically fragile children. *Hymer v. Harnett County Board of Education*, 664 F.2d 410 (4th Cir., 1981), the case of a child whose medical condition required maintenance of a tracheostomy tube and suctioning of mucus as "related services" provides another example of health care to be provided in order to allow students to enjoy a free and appropriate public education.

These cases demonstrate some of the issues associated with resuscitation of children who, due to conditions associated with their illnesses or disabilities, may actually be placed in imminent danger of death or further medical fragility whether or not action is taken in an emergency. "In the State of Maine alone, at least three school districts have received requests that the school recognize doctor-issued do not resuscitate orders should the need arise in the case of a medical emergency at school." (Herlan, 1994, p. 4) In 1994, the Maryland Office of the Attorney General issued an opinion that "school officials must accept the DNR order from parents of a terminally ill child and refrain from medical interventions that are inconsistent with it." (Opinion No..94-028m 1994). To refuse to comply with the order may open the district and the individuals involved in the decision to litigation or to IDEA or 504 hearings absent a state law that precludes adherence to such an order or a law that provides immunity to the district and to its personnel. School nurses are placed in a particularly difficult situation since the usual state definition of "health care provider" as reflected in the regulations of many states would include school nurses.

Key Questions

Clearly the issue of rights, specifically the right to die, is more difficult to address in the case of a child who is entrusted to teachers and a school for educational purposes than the case of an adult who is competent and makes a decision to exercise his liberty interest by signing a DNR order. In addition the variability of court decisions and the consequent lack of clarity tends to muddy the legal requirements for intervention in a medical crisis for school personnel and for the definition thereof in school policy. Certainly the school is not fundamentally a health care facility. The school nurse is a health care provider but not in the same sense as a charge nurse working in a hospital under the direct orders of a physician. Certainly most school nurses have standing orders but these to not generally relate to DNR. Still, as noted earlier, the school nurse may be construed as falling under the definition of "health care provider" in the regulations of several states.

The teacher, on the other hand, has a responsibility to safeguard his or her students but that teacher is not a health care provider, regardless of whether or not the teacher is certified in CPR or has training in first aid. The question remains as to what a teacher or other school personnel should do when faced with a DNR order prior to or in an emergency situation. In the Maine case, the request of the teachers' union to the Court that the DNR order be set aside and that teachers not be asked to participate in the decision was denied. (Herlan, p. 4) In an article in The Special Educator, "Common Pitfalls When Responding to DNRs", the following caveat is stated. "A district that responds to DNR orders on any level other than legal hasn't checked state law or explored whether the order is in the best interest of the child." The author goes on to say that ". . . the decision has already been made by way of the order . . . and it is not for a doctor.. or school personnel to make medical interventions inconsistent with the order". (Beekman, L., 1995, Vol. 10, No. 22.)

There is a distinct tension between the definition of medical services to be provided in the school setting such that students with disability can be "included" and the denial of emergency care in the presence of a DNR order. Cases such as *Macomb County Intermediate School District v. Joshua* 715 F. Supp. 824 (E.D. Mich. 1989) contrast with other decisions, for example, *Bevin v. Granite School District v. Shannon M.* 787 F. Supp. 1020 (D. Utah, C.D., 1992) and preclude clear directions by which schools may operate. In *Joshua,* the court ruled that the requested medically related services and constant monitoring, must be provided. In *Shannon M.* , the court felt that the level of nursing (constant monitoring) required was not a supportive service. In another case, *Bevin v. Wright* 666 F. Supp. 71 (W.D. Pa. 19870, the court ruled that the school district did not have to provide the extensive nursing services needed by a child with multiple handicaps under the Education for All Handicapped Children Act, (20 U.S. C. § 1491).

Although these three cases do not relate to the issuance of or compliance with a DNR order, they do clearly demonstrate the lack of consistency in court decisions relative to meeting the medical needs of students who are identified within the framework of IDEA or that of Section 504. The ruling in Detsel v. Sullivan (895 F2d 58 (1990) U.S. App. 2nd Cir.,), was that medically fragile children may properly be in regular schools and constant nursing may be paid by Medicare can be provided.

Several questions arise from the body of court rulings as well as from the lack of final clarity in regard to parental right to promulgate a DNR order for a child, whether that child is a minor or an adult who is incompetent as in the cases of Quinlan and Cruzan. Among these questions are the following:

- How is "in loco parentis" defined when there is a DNR order? Does the presence of the order change the traditional understanding of this definition by school personnel and in legal parlance?
- How is the interest of the state in preserving life, as represented by the school and its staff, impacted by the existence of e DNR order for a student?
- For purposes of compliance with a DNR order, is a school nurse considered a health care provider under the law (generally state statute)?
- Does the lack of intervention to assist a student with disabilities discriminate against that student, even with the existence of a DNR order, since the school would provide such interventions for a non-disabled student?

(Herlan, 15).

- Is the school nurse considered to be a "health care provider" under that state statutes such the "medical services" can be provided or does the nurse provide only "related services"? (The *Bevin* case addressed this distinction.)

- What is the liability of a principal who shares information relative to the order's existence with teachers who are generally in contact with the student and not with other staff when an emergency occurs which is life threatening? Is a civil rights tort committed, assuming that a DNR order is a right protected by law? Is a tort of negligence committed? Is failure to share this information to be construed as falling below an acceptable standard? If so, what is the injury caused the student and/or the parents who promulgated the DNR order?

Beckman, in a June, 1995 article in The Special Educator, makes the point that about 40 states allow a third party to make decisions regarding a DNR order (Vol. 10, No. 22). He suggest that it is important for school personnel to obtain a copy of the order and to consult with an attorney in order to determine what actions to take in the event of an emergency.

In March, 1998, an article appeared in Vol. 15, No. 5 Medical Malpractice and Strategy of the New York Law publications. In the article, Linda Crawford noted that in the *Belcher v. Charleston Area Medical Center* case (422 S.E. 2nd 827 [W. Va., 1992]), the court ruled that a 17 year old with muscular dystrophy "should have been required to give his consent to the DNR order. Complying with the wishes of the parents was not enough to satisfy the court that the DNR order should have been implemented by care givers." (This case, of course, places the decision in the hands of a minor if we interpret the age of majority to be 18.)

State Stances on DNR Orders and Schools

As noted case law is variable relative to the role of schools in the implementation of DNR orders. Court rulings are also few in number. The same pattern exists relative to the existence of state statutes that define the school role and responsibility in regard to DNR orders. A few state Attorneys General have presented opinions relative to DNR orders and issues in the schools. However, the lack of address to issues around DNR orders and school liability is indicative of the emerging nature of the potential legal questions around this.

Some states, for example Oklahoma, assertively answer the question of potential liability (63 Ok. St. § 3131.8 [1999]) by noting

> "A. No health care provider, health care agency, or individual employed by, acting as the agent of, or under contract with any such health care provider, health care agency, or individual shall be subject to criminal prosecution, civil liability, or discipline for unprofessional conduct for carrying out in good faith a do-not-resuscitate consent or order authorized by the Oklahoma Do-Not-Resuscitate Act on behalf of a person as instructed by the

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> person or representative or for those actions taken in compliance with the standards and procedures set forth in the Oklahoma Do-Not-Resuscitate Act.
>
> B. No health care provider, health care agency, individual employed by, acting as agent of, or under contract with any such health care provider, health care agency or individual or other individual who witnesses a cardiac or respiratory arrest shall be subject to criminal prosecution, civil liability or discipline for unprofessional conduct for providing cardiopulmonary resuscitation to a person for whom a do-not-resuscitate consent or order has been issued; provided, that such individual:
>
> 1. Reasonably and in good faith was unaware of the issuance of a do-not-resuscitate consent or order; or
>
> 2. Reasonably and in good faith believed that consent to a do-not-resuscitate order had been revoked or canceled."

In other words, some protection is provided to school nurses who, acting in their capacity as health care provider either fail to honor a DNR order or honor is within the legal definition of "good faith". The question of privacy and need to know within a school is not answered by the statute, however. In West Virginia statutes accord a similar protection (W. Va. Code §16-30C-9, 2000) that of Oklahoma and the statutes extend protection to those who witness a cardiac or respiratory arrest and who do or do not act.

Utah statutes accord similar protection, but only in the case of persons who are 18 years of age or older and who are in a terminal condition. The statutes are silent on the question of school age children. (Utah Code Ann. § 75-2-1105.5, 2000).

In 1996, the state of Tennessee enacted legislation concerning patient privacy and DNR orders, (Tennessee Health Law Update, July 1996, Vol. 2, Section 10). Section 5 of the act provides for private civil action for damages for invasion of privacy. The act adds protection for nurses making them immune for suit if they comply with a DNR order in accordance with the law.

In the *BelcherTown* case [*Belchertown v. Sackwicz* (373 Mass. 728(1977)], the Supreme Court of Massachusetts decided that "a decision as to whether to withhold medical treatment for a mentally incompetent person should conform as closely as possible to the decisions which would be made by the incompetent person if that person were competent. (@ 746-747). The question is how this relates to students who are not mentally competent and who have medical issues such that schools may be forced to decide whether or not to honor a DNR order in Massachusetts. To address this issue, one may look at the *ABC* case (1997) as a basis for in-school decision making in that state.

Other states take the following positions in case law and state statutes.

- Delaware (Title 16, Part 2, Chapter 25) holds that "health care decisions shall mean a decision made by an individual or the individuals, agent, surrogate or guardian regarding the individual's health care including:. . . do not resuscitate orders. On the face of it, the implication is that schools should comply with DNR orders.

- Arizona (A.R.S. § 36-3251 [2000]). The code addresses DNR orders and defines emergency medical system personnel in such a manner that school nurses could not be considered to be included. Therefore, school nurses would normally be required to resuscitate a student with a DNR order. However, immunity is provided for those acting in "good faith and pursuant to reasonable medical standards . . .(who) participate in withholding life sustaining treatment (c. 22-8A-7). The statute is framed for patients. Arguably this implies presence in a health care facility and not in a school.

- The California code (Cal. Prob. Code 4763 [2000]) defines a DNR order as "a written document signed by (1) the individual, or a legally recognized surrogate health care decision maker, and (2) a physician." Under the statute, a health care provider is specifically defined but the statute is silent relative to nurses not engaged as emergency response employees. Most school nurses would not be construed as emergency response employees and would therefore not be expected to comply with a DNR order.

- The Hawaii statutes (HRS §3273-2 [2000]) would not be considered as including school nurses in the cadre of heath care professionals who could honor a DNR order singe "health-care institution" is defined as an institution "permitted by law to provide health care in the ordinary course of business. The ordinary business of schools is not health care.

- In Connecticut, (Conn. Gen. Stat. § 192-580d [1999]), the statute calls for the Department of Public Health to adopt regulations in regard to DNR orders. The Attorney General of that state, in an opinion issued in 1984 (84 Op. Atty. Gen. Conn. 444) had asserted that the "rights of the individual must be weighed against state interests in the preservation of human life (p. 1)" Since schools are not equipped to make this decision, the decision to honor a DNR order is beyond the purview of a school and must be settled in other venues.

- The Virginia Code (VA. Code Ann §54.1-2987.1 [2000]) clearly notes that if the person who has an emergency is a minor, the authority to follow a DNR order is revoked if the person qualified to decide for the minor does not consent. The school role " in loco parentis" may be impacted in the state as the statute may require that contact be made in the event of an emergency to determine whether or not consent previously given is still applicable. In the interim, while contact is being made, one might suppose that resuscitation would have to be given. This fact may make the DNR order moot.

- In Georgia (O.O. G.A. 31-39-4 [2000]), the law is that "any parent may consent orally or in writing to an order not to resuscitate for his or her minor child when such child is a candidate for non-resuscitation. If in the opinion of the attending physician, the minor is of sufficient maturity to understand the nature and effect of an order not to resuscitate, then no such order shall be valid with out the assent of the minor." (d) This statute tends to make the decision of school personnel in regard to a DNR order even more complex and to necessitate substantial interactions with both the parent and the attending physician (an possibly with the student) prior to any action being taken or not taken. Clarity may be needed also as to the intent of the legislature in the statement "candidate for non-resuscitation and whether that designation is to be construed at the time of an emergency or at the time of issuance of the DNR order.

- Nebraska (R.R.S. Neb § 43-279 [2000]) is silent regarding DNR orders but in the an Attorney General's opinion (1997 NEB Leg. Lexis 9, Opinion No. 97-08) it is noted that DNR decisions are to be based on case by case basis for minors in the care of the state Division of Children and Family Services only. There is no statement made that would extend the decision making to schools or to school personnel.

- The Michigan Attorney General has also written an opinion (# 7009, March 2, 1999) regarding a child under 18 years of age that noted that there is no system for DNR outside of a health care facility. The opinion does indicate, however, that the position taken by an advocate or guardian/parent for a minor should be honored in matters concerning care, custody or medical treatment.

- Maryland (Md. Health General Code Ann. § 5-607 [1999]) code is very specific. This is reiterated in an Attorney General's opinion stating "if an attending physician of a terminally ill child has entered a do not resuscitate order on the authorization of the child's parents, school officials must accept the order and refrain from medical interventions that are not consistent with it." (79)P Atty. Gen. May 13, 1944).

- Louisiana Statutory law (La. R.S. 40: 1299.58.2 [2000]) requires the wearing of an identification bracelet indicating the presence of a DNR order. Certified first responders in an emergency are not liable for withholding life-sustaining procedures in the presence of such a bracelet and conversely, will not be liable for providing life-sustaining interventions if no bracelet is worn even if such an order exists. The Attorney General of Louisiana, in an opinion issued April 17, 2000 (Opinion No. 00-73) responded to a request for a policy regarding DNR made by the Louisiana Board of Elementary and Secondary Education and each LEA. The purpose of the request was to obtain a policy to clarify whether or not school personnel should honor or refuse to honor a DNR order. In the opinion, the Attorney General referenced two cases. The first case was that of *Lewiston, Maine Public Schools* (2ECLRR 121, OCR, 1994) in which OCR ruled that a "policy which did not distinguish between students with and without disabilities (in regard to treatment) but did allow for the development of individually designed medical resuscitation plans by multi-disciplinary school based teams" did not conflict with Section 504 or with ADA (p. 3). The second case was the *ABC* *case* previously discussed. The Louisiana Attorney General's opinion also cited the Maryland Attorney General's opinion and concluded that state law and policy regarding DNR did not apply to children who are not terminally ill. The Attorney General stated "Louisiana law does not address the responsibility of this type of declaration being complied with by school personnel." He further noted that the risk to a child from treatment must out weigh the benefits for any consideration to be given to DNR in schools. He cited the National Education Association's DNR policy that was published in June 1994 noting:

> "The proposed policy does not take a position on whether school districts should, as a matter of public policy, honor DNR orders. That is an issue that should be resolved at the state level or local level. However, in considering the request to honor a DNR order, the school District should consult with counsel to determine what legal rights and responsibilities it has, including the applicability of a collective bargaining agreement."

In other words, DNR orders must be handled on a case by case basis. The NEA recommended that a plan be in place, that parents put the request in writing and that a physician should sign it (the plan). The plan should specify actions that teachers or other employees should take and the plan should be reviewed annually. Further, all school employees who may have to supervise the student during the school day should be fully briefed on procedures to follow. An additional recommendation was that the student should wear an identification bracelet noting the DNR order. Finally, the NEA suggested that training and counseling and educational programs on the topics of death and dying should be provided for students and staff alike.

Louisiana does not have precedent in case law on the specific topic of DNR orders. However the ruling in the case *In Re: .D.V.W.* (424 So. 2d 1015 [La. 9182]) did recognize that a child has an independent right to discontinue artificially sustained life (with certain conditions). No change in the law was made by virtue of the Attorney General's opinion.

Arkansas law has addressed the role of teachers in the implementation of DNR orders with some of the greatest clarity of all states save Maryland and Massachusetts. In Arkansas (Ark Stat. Ann. §201-13-901 [1999]), no one but a licensed physician may honor a DNR order. Neither teacher, nurse nor emergency service personnel may do this.

Since the law is clear, a survey was conducted of Arkansas schools in order to ascertain whether or not the schools and districts had developed policy in compliance with the law with regard to DNR orders.

The survey results will be presented and discussed at the session. Additionally, there will be a discussion of implications for school districts in other states.

LEGAL ISSUES EVOLVING FROM THE USE OF EVALUATIONS IN TEACHER EMPLOYMENT TERMINATIONS

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Introduction

The Joint Committee on Standards for Education Evaluation has identified the following purposes for evaluation of educational personnel: "Evaluation of educators should promote sound education principles, fulfillment of institutional missions, and affective performance of job responsibility, so that the educational needs of students, community, and society are met."[1]

Two types of evaluations are used for educational personnel: formative evaluations and summative evaluations. Both accomplish the same goals: 1) to identify teaching weakness; and, 2) make recommendations to correct those weaknesses. The difference between the two types of evaluations is in how they are used. Formative evaluations serve a developmental function. The purpose is to help an individual employee improve the employee's effectiveness on the job by providing feedback and coaching. Summative evaluation refers to assessment carried out for accountability purposes. This type of evaluation is usually conducted annually or semi-annually, and the results are used to make decisions about individuals, such as whether to grant tenure, to seek termination or transfer, to place an individual on a career ladder, or to make a salary adjustment.[2]

This paper examines legal issues that arise when evaluations are used in educational personnel employment termination hearings. Those issues include: validity of evaluation criteria, procedural due process, right vs. privilege to due process, measuring teacher competence with evaluations, evaluator qualifications, preciseness of evaluation policies, peer evaluations, and confidentiality of personnel records.

Validity of Evaluation Criteria

The criteria selected for use in evaluating teachers should be supported by research and experience showing the criteria is related to desirable learning outcomes. Those learning outcomes are stated in a variety of ways by states. For example, in Georgia, learning outcomes are stated as the "Quality Core Curriculum," in Texas the "Texas Essential Knowledge and Skills (TEKS) curriculum, and the Priority Academic Student Skills (P.A.S.S.) in Oklahoma. The evaluator has the task of determining whether a teacher uses validated teaching behaviors and also judges whether the behaviors are used in appropriate situations. This decision must take into consideration the teacher's instructional objectives, the types of students in the class, and the situation in the classroom at a given moment.[3]

Several states have recently instituted mandatory programs for evaluating teachers. Although the plans differ from state to state, they have some common characteristics. Typically, criteria for teacher evaluations include planning, teaching strategies, student assessment, classroom management, professional leaderships, and communication. For example, in Texas, data from teacher observations are used for such decisions as contract renewal, placement on a career ladder, and as an indicator of the need for staff development programs related to particular teaching skills.[4]

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[1] Joint Committee on Standards for Educational Evaluation. (1988). *The personnel evaluation standards: How to assess systems for evaluating educators.* Newbury Park, CA: Sage.
[2] Educational Research Service. (1978). *Evaluating teacher performance.* Arlington, VA.

State-sponsored teacher evaluation systems have identified teacher strengths and weaknesses. A study by the Southern Regional Education Board (SREB) (1991) identified strengths of teacher evaluation programs including the use of research on effective teaching; requiring beginning teachers to demonstrate satisfactory classroom performance prior to initial licensure; introducing a set of common terms and concepts with which to discuss teacher performance; and linking evaluation of teaching with professional development. Weaknesses identified included absence of attention to teachers' knowledge of the subject they teach; an overreliance on classroom observation and little use of other means of documenting teaching effectiveness; the failure to assess the relationship between teachers' practices and student outcomes; and the lack of attention to develop ways of identifying the most competent teachers.[5]

Most teachers receive satisfactory performance ratings, even though their performances do not always justify them. It is extremely difficult to convince a court that a teacher's performance falls below the minimally acceptable standard when over a period of years the teacher has consistently received satisfactory performance ratings from principals. This problem is not exclusive to schools; it happens in most organizations.[6] However, organizations that do not grant tenure to their employees have more discretion in discharging unsatisfactory performers. When the decision is made to terminate a tenured teacher, the district should be able to produce evidence showing a pattern of unsatisfactory performance. Moreover, the board should be prepared to show a connection between identified deficiencies and loss of learning.[7]

Procedural Due Process

The U.S. Supreme Court has ruled that teachers have Fourteenth Amendment procedural protection of their property interest in their employment when that property interest is created by an independent source such as state law. A teacher's "property" interest in the teacher's employment is created and defined by the terms of the teacher's appointment.[8]

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[3] Knapp, M. (1982, March). *Toward the study of teacher evaluation as an organizational process: A review of current research and practice.* Paper presented at the annual meeting of the American Educational Research Association, New York.

[4] Barnes, S. (1987). *The development of the Texas Teacher Appraisal System.* Paper presented at the annual meeting of the American Educational Research Association, Washington, DC. (ERIC Document Reproduction Service No. ED 294323).

[5] Southern Regional Education Board. (1991). *Teacher evaluation programs in SREB states.*

[6] Bridges, E. (1984). *Managing the incompetent teacher.* Eugene: University of Oregon, ERIC Clearinghouse on Educational Management.

[7] Barton, M. (1984, April). *What you ought to know about termination and due process.* Paper presented at the annual meeting of the National School Boards Association, Houston. (ERIC Document Reproduction Service No. ED 247641).

[8] Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

Depending on a state's statutory provisions, dismissal of a tenured teacher or one under a continuing contract must be in conformance with state law. State provisions usually contain grounds for dismissal such as nonperformance of duty, incompetency, insubordination, conviction of crimes involving moral turpitude, failure to comply with reasonable orders, violation of contract provisions or local rules or regulations, persistent failure or refusal to maintain orderly discipline of students, and revocation of the teaching certificate. Additionally, all of the procedural aspects of the hearing process provided by state statute must be afforded the teacher.[9]

Right vs. Privilege to Due Process

Generally, the teacher is entitled to all procedural due process rights guaranteed by the state and United States Constitutions, including a statement of the specific teaching deficiencies alleged as the result of an evaluation. The Court, in Jackson v. Independent School Dist. No. 16 of Payne County, addressed the distinction drawn between a right and a privilege for the application of the due process clause.[10] The Court noted that the distinction seems to have been discarded in favor of the concept of entitlement

> " . . . which is based on expectations derived from independent state law. Entitlements have become synonymous with state fostered justifiable expectations which are not equated with a right when given but which are protected by due process when curtailment is threatened."[11]

The right to due process entitles the teacher to be given notice and an opportunity to be heard; granted a reasonable time to prepare for the hearing; be heard before a fair and impartial tribunal; advised of the decision reached by the board and a general explanation of the basis upon which the decision was reached, and a written transcript of the proceedings.

Formative and Summative Evaluation Due Process Issues

To protect teachers' rights to procedural fairness, most states impose specific requirements for conducting performance evaluations. Some states require that teachers are notified in advance of the criteria upon which they will be evaluated and, in case deficiencies are found, teachers informed of the nature of the problems. Other requirements establish minimum number of classroom observations as part of the evaluation process or specify a deadline for completing the process.[12] Districts are also allowed latitude in establishing performance criteria.[13]

An important element of due process in the use of evaluations in teacher terminations is for the teacher to be aware that failure to meet the improvements cited in the evaluation may result in the dismissal or nonreemployment of the teacher. If such notice is lacking on an evaluation, the teacher may make the argument that the evaluation was "formative" rather than "summative." Therefore, the line between a "formative" evaluation and a "summative" evaluation may become blurred. Moreover, if a "formative" evaluation does not result in a rise to a satisfactory performance level, a "summative" evaluation may follow. It can then be argued that all of the evaluations in the process were "summative" due to the ultimate summative "use" of the evaluations, therein invoking a procedural due process violation claim.

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[9] LaMorte, M., School Law: *Cases and Concepts*, 6th ed. (Needham, MA: Allyn & Bacon, 1999).

[10] 648 P.2d 26.

[11] *Id.* at 31.

[12] Webb, L. (1983). Teacher evaluation. *Educators and the law.* Elmont, NY: Institute for School Law and Finance.

[13] McCarthy, M., & Cambron-McCabe, N. (1987). *Public school law: Teachers' and students' rights.* Boston: Allyn and Bacon.

Measuring Teacher Competence with Evaluations

Measuring teacher competence with evaluation instruments for employment decision purposes is a subjective process. The challenge is to relate observable, measurable teaching performance to acceptable performance levels as required by law. The difficulty in making employment decisions based on teaching performance, as measured through evaluations, is shown by the fact that even though teaching competence is arguably one of the most severe problems facing schools, school administrators have been lax in failing to take firm and prompt action to dismiss teachers who are not performing satisfactorily.[14]

Before a school district may make a negative employment-related decision based on a teacher's evaluation, an administrator must first have identified an unsatisfactory teaching-related performance and then placed the teacher on a plan of improvement to correct the problem. A study of three hundred and fifty-eight school administrators, board members, tenured teachers, and attorneys who practice in the area of public school law supports the notion the administrators are reluctant to place teachers on plans of improvement. The study survey asked respondents to reply to the question, "How many plans of improvement have you been involved with in a public school in Oklahoma?" Nearly three-fourths [73.2%] of all respondents to the survey reported involvement in five plans of improvement or less. More than half of the respondents [52%] reported involvement in two plans of improvement or less. Notably, approximately one-third of the respondents [31.5%] reported no involvement in plans of improvement.[15]

Courts generally interpret statutes on teacher dismissal to favor teachers, which places on the district the burden of assembling substantial documentation to show that the teacher was guilty of persistent unsatisfactory teaching performance. Testimony of department heads, administrators, teachers, parents, and even students may be introduced to establish incompetence and to show a connection between the teacher's conduct and his or her performance as a teacher. If the board is not successful in convincing the court of the teacher's incompetence, it may be ordered to reinstate the teacher pay lost wages and damages.[16]

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[14] Johnson, S. (1984). *Teacher unions in schools.* Philadephia: Temple University Press.
[15] Tate, J. "An Evaluation of School Board Hearing Procedures and the Trial de Novo Appeal in Career Teacher Employment Termination Proceedings in Oklahoma Public Schools." Ph.D. diss. University of Oklahoma, 1999.
[16] *Education law* (Vol. 2). (1989). New York: Matthew Bender.

Evaluator Qualifications

Due process issues involving the use evaluations arise when qualifications of the evaluator are brought into consideration. The validity of the evaluation will hinge upon whether or not the administrator is knowledgeable about student learning and trained to recognize and document effective teaching indicators. The evaluator should have comprehensive knowledge of the state-mandated curriculum, understand the learner outcomes to be achieved, and be fluent in student learning abilities in the cognitive, psychomotor, and affective domains.

Characteristics of the evaluator and the quality of information provided teachers influence the extent to which workers benefit from performance evaluation. An evaluator's credibility, relationship to the employee, and ability to model suggestions have all been found to positively correlate with the appropriate use of evaluation information.[17] State law may specify who may evaluate teacher performance for employment-related purposes.[18] State law may also require that evaluators receive evaluation training. In addition, school boards may have the authority to designate who conducts personnel evaluations.[19]

Preciseness of Evaluation Policies

The Court has recognized that teacher evaluations are subjective. The Court does not require a school district to identify " . . . each and every element which would be considered in making future employment decisions."[20] The Court noted that the area of personal and professional growth is broad enough to encompass working relationships and that it is proper for the school district to consider such matters in employment decisions.[21]

Courts have acknowledged that proving teacher incompetence generally requires a showing of multiple deficiencies through repeated evaluations that clearly show unremediated deficiencies. Rarely does incompetency in teaching rest on a single accident. According the *American Law Reports*,

> [T]he incompetent teacher is rarely deficient in one respect alone; rather, incompetence seems to manifest itself in a pervasive patter encompassing a multitude of sins and bringing in its wake disorganization, disharmony, and an atmosphere unproductive for the acquisition of knowledge or any other ancillary benefit.[22]

Incompetence is one of the most often used grounds to terminate teachers even though it is subjective, time-consuming, and demanding of documentation. Incompetence must be related to the teaching process. The areas found most litigated are student discipline problems and instructional failures.[23] Use of incompetence, based on teacher evaluations as grounds for termination, requires implementation of a plan of improvement, fair opportunity for the teacher to remediate the unsatisfactory performance, and documentation of the teacher's failure to meet the prescribed minimal level of performance after the period of remediation expires.

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[17] Duke, D., & Stiggins, R. (1990). Beyond minimum competence: Evalution for professional development. In J. Millman & L. Darling-Hammond (Eds.), *The new handbook of teacher evaluation*. Newbury Park: CA: Sage.

[18] Okla. Stat. tit. 70, § 6-101.24(C).

[19] Okla. Stat. tit. 70, § 6-101.10.

[20] Wood v. Independent School Dist. No. 141 of Pottawatomie County, 661 P.2d 892.

[21] *Id.* at 36.

[22] 4 A.L.R. 3d 1090 at 1102.

Reasonable Time for Improvement

Before a teacher's evaluation may be used for employment termination purposes, procedural due process requires the teacher be given notice of the identified teaching deficiencies and the opportunity to correct those deficiencies. A teacher is typically placed on an improvement plan that defines the specific period of time in which the teacher has to correct the deficiencies and to what minimum level of improvement the teacher is expected to reach.[24]

A school district's failure to specify reasonable time for improvement in a plan for improvement may be a violation of the evaluated teacher's due process rights in an employment termination action. However, the question will hinge on the grounds asserted by the school for dismissing the teacher. The teacher must show that the teacher was adversely affected by the error. The Court, in House v. Independent School District I-29 of Muskogee County, held that compliance with the statutory requirements of specifying a reasonable time for improvement does not apply to dismissal on the grounds of moral turpitude or mental or physical abuse of a child.[25] The Court also noted that their conclusion may have been different if, " . . . the principal had sought the teacher's dismissal after only a few days without having specified in the plan (of improvement) a reasonable time to correct the problem."[26] Therefore, for purposes of due process, a teacher is entitled to a reasonable time for improvement only for remediable unsatisfactory teaching-related matters identified in a summative evaluation and included in a plan of improvement.

Peer Evaluations

Peer evaluations are formative evaluations. In peer evaluations (also referred to as "peer coaching") the peer evaluator critiques the teacher's performance, demonstrates the technique, and makes suggestions for improvement. The teacher and peer evaluator then discuss appropriate ways to improve the teacher's instructional strategy.[27]

Peer evaluations should not be used for teacher employment decision purposes. It is well established that peer's have no legal standing to make teacher assignments. Teacher assignment is a discretionary function, which boards cannot delegate.[28] To use peer evaluation in employment-related decisions would change the "use" of the peer evaluation from formative to summative. This could potentially create numerous legal problems for the school district including breach of confidentiality of employee records and procedural violations including the teacher's right to be evaluated by legally designated personnel certified to evaluate personnel for employment decision purposes. The teacher would also be entitled to notice that failure to meet minimal performance standards from the peer evaluation may result in dismissal or nonreemployment.

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[23] Rossow, L., & Parker, J., *The Law of Teacher Evaluation*, National Organization on Legal Problems of Education monograph No. 42 (1992).

[24] Seyfarth, J. (1996). *Personnel Management for Effective Schools.* Needham, MA: Allyn and Bacon.

[25] 939 P.2d 1127 (1997).

[26] *Id.* at 1132.

[27] Duttweiler, P. (1989, Spring). Components of an effective professional development program. *Journal of Staff Development,* 10, 2-6.

Mandatory Statutory Compliance of Evaluation Procedures

How strictly a school district must comply with statutory requirements regarding evaluations varies depending on state law and the circumstances involved. In Goodrich v. Newport News School Board,[29] a tenured teacher was terminated after receiving only two evaluations when local board policy required that the administration provide three evaluations during the school year. The Court held that a violation of state or local board policies is not *per se* a violation of the federal constitution. The Court reasoned that the teacher was given adequate procedural due process under the federal question and a failure of strict compliance with specific local procedures is a matter to be addressed in state court.[30]

A school district is more likely to be held to a standard of strict procedural compliance in state court. Where state law requires that a teacher be given an admonishment and a reasonable opportunity to improve before the teacher may be dismissed for an unsatisfactory evaluation, the Courts have required strict statutory compliance.[31] In addition, if a school district must comply with a statutory mandate that a teacher's existing written contract be renewed automatically by force of law if (1) the board has not either (a) entered into a renewal contract or (b) notified the teacher of nonrenewal by a statutory deadline date, and (2) if the teacher has not in writing notified the board by a statutory deadline date that the teacher does not desire to be reemployed, the teacher's existing contract will be renewed automatically by force of law.[32] The teacher may invoke this rule of "continuing contract" law as grounds for contract renewal regardless of the outcome of the teacher's evaluation.

Confidentiality of Evaluations

Teacher evaluations may be maintained as confidential employee records pursuant to state law.[33] The statute may also specify to whom teacher evaluations may be made available.[34] Generally, this includes the teacher evaluated, the administrator in charge of the evaluation, superintendent, and the board of education, and other persons specified by the teacher in writing. However, state law may also require the teacher's evaluation be made available to other school districts in that state to which the teacher applies for employment.[35]

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[28] Diefenderfer v. Budd, 563 P.2d 1355 (Wyo.1977).

[29] 743 F.2d 225 (4th Cir. 1984).

[30] *Id.* at 227.

[31] Jackson v. Independent School Dist. No. 16 of Payne County, 648 P.2d 26 (Okla. 1982).

[32] Miller v. Independent School Dist. No. 56 of Garfield County, 609 P.2d 756 (Okla. 1980).

[33] Okla. Stat. tit. 70, § 6-101.11.

[34] *Id.*

Parents of public school students have been successful in gaining access to copies of school employee performance evaluations under the state's Freedom of Information Act (FOIA). In Lansing Ass'n. of School Administrators v. Lansing School Dist. Bd. of Educ.,[36] the court held that personnel evaluation was not exempt from disclosure under FOIA. The court reasoned that the FOIA created no legal cause of action to prevent a disclosure, therefore the school district would have to raise an independent basis for prohibiting disclosure. In applying common law privacy principles, the court found no violation of privacy rights in the public release of the evaluations. The parents' request to reveal the performance evaluation records were not intrusive, embarrassing or objectionable and did not relate to any private facts. The court ruled the administrators and the employee enjoyed no common law privacy rights concerning the personnel information requested by the parents group.[37]

Courts have not been willing to extend third party access to other teacher personnel file documents such as medical records which disclose the nature of illness or the state of an employee's health.[38] However, a taxpayers' association was able to access information relating to a school employee's sick pay compensation. The court ruled the employee had no reasonable expectation of privacy of confidentiality in that compensation.[39]

Conclusion

Evaluating teaching performance is a subjective process. Formative and summative evaluations both involve an evaluator whom: identifies teaching deficiencies; assists the teacher in correcting those deficiencies; provides a reasonable time for the teacher to correct the deficiencies; and, reassess the teacher's performance. The difference between the two types of evaluations is in how they are used. Formative evaluations are used to improve teaching performance. Summative evaluations are used for employment-related decisions.

The fundamental application of due process in teacher performance evaluations for employment purposes is the teacher has notice that an unsatisfactory performance evaluation may lead to termination. Therefore, formative evaluations should not be used for employment-related decisions.

Research shows that administrators are reluctant to use teacher performance evaluations for termination purposes. Summative evaluations are complex. They require a valid evaluation instrument, proper evaluator training and skills, due process compliance, and supportive documentation over a significant period of time. Courts have recognized that performance evaluations are subjective and allow school districts generous latitude in determining what is, and is not, effective teaching. However, courts look for patterns of behavior, and if none are found, they are likely to support reinstatement.

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[35] *Id.*

[36] 549 N.W.2d 15 (Mich. App.1996).

[37] *Id.*

[38] Perkins v. Freedom of Information Comm'n., 228 Conn. 158, 635 A.2d 783 (Conn.1993).

[39] *Id.*

Recent court decisions reflect society's current expectations of accountability from public schools regarding teacher evaluations. Under states' FOIA, parents of public school students have been able to gain access to a teacher's performance evaluation as a public document of a public employee job performance that is not exempt from disclosure.

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Okla. Stat. tit. 70, § 6-101.24(C).

4 A.L.R. 3d 1090 at 1102.

The Internet and Legal Issues

Tripping the Web Fantastic:
The Internet and the First Amendment

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Education Law Association
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TRIPPING THE WEB FANTASTIC:
The Internet and the First Amendment[1]

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What a short, strange trip the last decade has been! In 1989, "surfing" was something done mostly in California and Hawaii; the "Web" was something made by a spider; and "AOL" probably stood for something unmentionable in decent conversation. In 1999, we get our news, books, music, and even our food with a simple click of the mouse on our home computer. The United States Supreme Court estimates that the number of host computers on the World Wide Web have increased from 300 in 1981 to approximately 9,400,000 in 1996.[2]

The Internet is the cyberspace equivalent of the double-edged sword. It is the greatest collection of information the world has ever seen...but it is also the world's leading purveyor of pornography. Electronic mail (more commonly known as "e-mail") has revolutionized personal communications and made it vastly easier to keep in touch with friends and relatives...if you can wade through the dozens of junk e-mails that appear in one's mailbox on a daily basis. Aspiring authors can "publish" their writings and thoughts on the 'Net with the greatest of ease...and we now know why many of them are still amateurs.

The Internet highlights two growing–and sometimes contradictory–missions of the public school system: improve and revolutionize education through the greater use of technology, and teach students the moral values that sometimes seem to have dropped by the wayside in our communities. The Internet is a dangerous place to let unsupervised students explore, as any civic-minded individual who has tried to visit the website "www.whitehouse.com" can testify.[3]

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[1] This speech is the rough draft of a chapter from an upcoming (and as yet unnamed) book on the Internet. The author apologizes for any typographical errors and/or "uncompleted thoughts."

[2] *See Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2334 (1997). Ironically, the Supreme Court is still not one of them; as of the writing of this article, the Supreme Court did not have its own website.

[3] It's a pornography site. Trust us on that. The real White House is at "www.whitehouse.gov."

In considering how the First Amendment applies to the Internet in the public schools, it is important to remember that the courts have repeatedly stated that minors do not have the exact same First Amendment rights that adults do.[4] Despite the all-encompassing nature of the Internet, there have been remarkably few published court decisions regarding the 'Net – although that appears to be changing. The courts are still struggling to define the Internet, at least from a legal standpoint. Because there has not yet been a major "Internet-in-the schools" case, we have to turn to the closest analogies that we do have: school-sponsored speech platforms (the school newspaper cases) and school libraries (the book-banning cases).

1. All the School's a Stage: the School-Sponsored Speech Cases

Some of the most famous and influential First Amendment cases have started out as the sort of "commonplace" student discipline disputes that assistant principals handle on a daily basis across the United States. A dress code dispute led to ***Tinker v. Des Moines Independent Community School District***,[5] which gave us the famous and oft-quoted admonition: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[6] A sexual joke made by a student with too much wit and too little wisdom spawned ***Bethel School District No. 403 v. Fraser***.[7] And the editing--some would say censoring--of a student newspaper gave us ***Hazelwood School District v. Kuhlmeier***.[8] These three cases make up the backbone of how the courts have applied the First Amendment to student speech in the public schools, and they therefore make a good place to start in deciding how the courts would treat the Internet and the First Amendment.

THE ARMBANDS: *Tinker v. Des Moines Independent Community School District*

Tinker, which represents the highwater mark for student speech rights in the public schools, involved a group of students who were disciplined for wearing black armbands to school to protest the Vietnam War. Both the district court and the court of appeals found for the school, but the United States Supreme Court overturned the lower courts and ruled in favor of the students. Although the Court noted the need for school officials to maintain order and discipline, it was concerned that there was no evidence that the armbands had caused any disorder or disruption of the educational process. Undifferentiated fear or apprehension of disturbance is not enough, warned the Court, to justify stifling free speech.

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[4] *See Sable Communications of California v. Federal Communications Comm'n*, 492 U.S. 115, 109 S.Ct. 2829 (1989) (holding that "dial-a-porn" that is accessible to minors may be regulated, even where the material is not obscene by adult standards); ***Action for Children's Television v. Federal Communications Comm'n***, 852 F.2d 1332 (D.C. Cir. 1988) (Ruth Bader Ginsburg, J.) (holding that the FCC may limit children's access to indecent material on television, even where the material is not constitutionally obscene).

[5] 393 U.S. 503, 89 S. Ct. 733 (1969).

[6] *Tinker*, 393 U.S. at 506, 89 S. Ct. at 736. It should also not be forgotten that the Court presaged its famous quote by warning that such rights must be "applied in light of the special characteristics of the school environment...." *Id.*

[7] 475 U.S. 675, 106 S.Ct. 3159 (1986).

[8] 484 U.S. 260, 108 S.Ct. 562 (1988).

Tinker did not, however, grant students the absolute right to unregulated speech; the Court recognized that a school could regulate speech where it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[9] This has come to be known at the *Tinker* test. In addition, the Court noted the importance of the specific fact situation of each case in applying the above standard.

THE SPEECH: *Bethel School District No. 403 v. Fraser*

Fourteen years later, a high school student named Matthew Fraser caused a ruckus during a school assembly that would lead the Court to re-evaluate the strong pro-student statements it had made in *Tinker*. Fraser had been asked by a friend to give a nominating speech at the assembly on behalf of the friend. Fraser rose, walked to the microphone, and delivered a speech that lives in infamy in the public school system:

> I know a man who is firm--he's firm in his pants, he's firm in his shirt, his character is firm--but most ... of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts--he drives hard, pushing and pushing until finally--he succeeds. Jeff is a man who will go to the very end--even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president--he'll never come between you and the best our high school can be.[10]

Whatever we may think of Fraser's speech, which by 2000's MTV-driven standards is fairly tame, it shocked the administration of Bethel High School, which suspended Fraser for three days and removed his name from the list of potential graduation speakers (although, by order of the district court, he was allowed to speak at graduation). An appellate court ruled that under *Tinker*, Fraser prevailed because the school failed to show a "material and substantial interfere with the requirements of appropriate discipline in the operation of the school."

The Supreme Court, calling the speech "an elaborate, graphic, and explicit sexual metaphor," found in favor of the school and reversed the lower court's decision. Noting that there was a "marked distinction" between the "political" nature of the armbands in *Tinker* and the "sexual" nature of Fraser's nominating speech, the Court ruled that the right to express unpopular and controversial views in the public school must be weighed against the school's duty to teach students "the boundaries of socially appropriate behavior." The Court then reaffirmed what it had ruled the year before in considering the standard for searching students in the public schools: that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[11] To graphically illustrate its meaning, the Court stated that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[12]

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[9] *Tinker*, 393 U.S. at 509, 89 S. Ct. at 738 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[10] *Fraser*, 478 U.S. at 687, 106 S. Ct. at 3166 (Brennan, J., concurring).

After stating its opinion that the lower courts' reliance on *Tinker* was misplaced, the Court's decision is strangely quiet as to what standard should be applied to Fraser's speech. Although the Court did not actually state that under *Tinker* it found Matthew's speech to be "materially and substantially" disruptive, it was clearly influenced by the fact that Matthew had apparently caused quite a stir--there was much hooting and hollering, some students made gestures to go along with Fraser's speech, and teachers reported that students were "bewildered and embarrassed" by the speech. It may be that the Court was not ready to completely refute the *Tinker* standard and was looking for some sort of compromise test, or it may be that the Court simply felt that Fraser's speech and Tinker's armbands were so different that they could not be encompassed by a single rule. Regardless, the Court made one thing clear: the Constitution does not compel school officials "to surrender control of the American public school system to public school students."[13]

THE NEWSPAPER: *Hazelwood School District v. Kuhlmeier*

Two years later, the Court appeared ready to take on some of the loose ends left by *Fraser* and clarify its thoughts on the continuing applicability of *Tinker*. Like both *Tinker* and *Fraser*, the events that led to the *Kuhlmeier* decision probably did not seem monumental to school officials at the time they happened. At Hazelwood East High School in St. Louis, Missouri, the school principal directed the journalism teacher to withhold two stories that were slated for the May 1983 student newspaper. The principal was concerned that even though false names had been used in an article about student pregnancy, the identities of the pregnant students might still be discernable. He was also concerned that the parents in an article on divorce were not given a chance to respond to the claims of their children, a practice he considered to be poor journalism. The publication deadline was imminent, so the articles were pulled rather than rewritten. The student authors were angry, and the *Kuhlmeier* litigation began.

The court of appeals relied heavily on *Tinker* and ruled for the students, finding no evidence that the articles in question could have caused a material or substantial disruption in the school. Like in *Fraser*, the Supreme Court reversed the lower court and ruled for the school, finding that the limited rights given to the students involved in developing the newspaper did not overcome the fact that school policy granted the journalism teacher and the principal final authority over what was printed. In a departure from *Tinker* and *Fraser*, the

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[11] *Id.* at 682, 106 S. Ct. at 3164 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42, 105 S. Ct. 733, 742-43 (1985)).

[12] This is a reference to *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 178[illegible]971), in which the Supreme Court overturned the conviction of a young man for wearing a jacket in a courthouse that read "Fuck the Draft."

[13] *Id.* at 686, 106 S. Ct. at 3166. In trying to determine how the *Fraser* Court felt about the earlier *Tinker* decision, it is interesting to note that this quote is actually from Judge Black's dissent in *Tinker*.

Court used a new method of analysis: the forum analysis, which had been made popular in the early 1980's in a series of cases involving the right of physical access to public schools in a variety of contexts.[14]

Under the forum analysis, how much speech is allowed in a certain location or what sort of access is required to that location depends on what sort of "forum" the location is considered to be. The courts recognize three different types of forums. A "public forum" is the sort of public property that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[15] Common examples are streets and parks. Because traditionally these sorts of public property have been used for public speech, the greatest amount of unrestricted speech is allowed in a public forum. In traditional public forums, speech can only be regulated if the government has a compelling reason for doing so, and if the restrictions are narrowly tailored to meet that compelling reason.

"Closed" or "nonpublic forums" occupy the opposite end of the spectrum from open forums. In a closed forum, reasonable restrictions on speech are permissible:

> [S]chool facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.[16]

A "limited" or "designated" public forum is a hybrid forum made up of property generally not considered to be a traditional public forum, but that has nonetheless been opened by the government for expressive activity. "Limited public forums" are generally subject to the same standards as traditional public forums.

Public schools are not traditional public forums. A school cannot create a public forum or a limited public forum by accident or by inaction, but only by intentionally opening a nontraditional forum for indiscriminate public discourse.[17] In general, the courts have ruled that absent clear evidence of an intent to open a school up for indiscriminate public discourse, schools are closed forums.[18] However, even in a closed forum, the school may only control access "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and ***are viewpoint neutral.***"[19]

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[14] *See, e.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 103 S.Ct. 948 (1983) (the right of teacher unions to distribute union literature through teacher mailboxes), and *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269 (1981) (the right of religious organizations to meet on the property of a state university).

[15] *Hague v. CIO*, 307 U.S. 496, 59 S. Ct. 954 (1939).

[16] *Kuhlmeier*, 484 U.S. at 267, 108 S.Ct. at 568 (internal citations omitted).

[17] *Id.* at 267, 108 S.Ct. at 568.

[18] *See, e.g, Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th 1996) (elementary schools are

The Hazelwood newspaper was written as part of an academic course, and the school's practice had been for the journalism teacher and the principal to review each article before it was published. Because the school had reserved the forum (the newspaper) for its intended purpose--a supervised learning experience for journalism students--the Supreme Court found that a "clear intent to create a public forum" in the newspaper did not exist, and the newspaper was a closed forum. Therefore, school officials were entitled to regulate the contents of the newspaper "so long as their actions are reasonably related to legitimate pedagogical concerns."[20]

So do *Tinker*, *Fraser* and *Kuhlmeier* provide the appropriate analogy to the Internet, at least in the context of public schools? There are some similarities, but the match is not perfect. Perhaps, instead, the Internet should be viewed as a really big library, full of millions and millions of books....

2. To Ban or Not to Ban: The School Library Cases

Introduction: Book challenges are not a thing of the past: People for the American Way documented 374 book challenges in 1991-1992, meaning that every single day of the year--including Saturdays and Sundays--somebody somewhere was complaining about a book in a public library. The reasons for the challenges varied: 23.7% of the challenges claimed the material involved Satanic or witchcraft themes; 17 % were based on religious conflicts; 13.3% were because the material was "too sexual"; 11.9% claimed that the material was inappropriate for a given age group; 8.1% claimed that the material was offensive to minority groups; 12.6% cited violence or profanity; and 13.4% were for other reasons. By the 1995-96 school year, the number of challenges had dropped somewhat (300), and the reasons had shifted from religion based (40.7% in 1992/93, to 18% in 1995/96) to claims that material was "too sexual" (from 13.3% in 1992/93 to 44% in 1995/96). Claims that the challenged material contained excessive violence, profanity, or offensive language rose to 24%, while claims that the material was offensive to minority group dropped to 6%. 8% of the challenges were for other reasons.

The American Library Association reports that between 1990 and 1998, they recorded 5,246 book challenges.[21] The vast majority of challenges (76%) took place in schools or school libraries, while 26% took place in public

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closed forums); *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993) (junior high schools are closed forums).

[19] *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 587 (7th Cir. 1995) (emphasis added).

[20] *Kuhlmeier*, 484 U.S. at 273, 108 S. Ct. 571.

[21] *See* http://www.ala.org/bbooks/challeng.html. The ALA admits that the data is hardly comprehensive and could represent only a fraction of actual challenges, since many challenges go unreported.

libraries. Parents brought 60% of the challenges; 16% were brought by patrons, and 10% were initiated by administrators.

Reason for Challenge	# of challenges	Percent
"sexually explicit"	1,299	24.8%
"offensive language"	1,134	21.6%
"unsuited to age group"	1,062	20.2%
"occult theme or promoting the occult"	744	14.2%
homosexual theme or "promoting homosexuality"	474	9.0%
Material that dealt with religious viewpoint	373	7.1%
nudity	276	5.3%
racism	219	4.2%
sex education	190	3.6%
thought to be anti-family	186	3.5%

What is shocking are the materials and books that are typically challenged. Most public libraries do not stock *Playboy* and *Penthouse*; instead, *Death of a Salesman* by Arthur Miller; *The Grapes of Wrath* and *Of Mice and Men* by John Steinbeck; *1984* by George Orwell; *I Know Why the Caged Bird Sings* by Maya Angelou; *The Color Purple* by Alice Walker; and *The Handmaid's Tale* by Margaret Atwood have all been challenged. Modern literature is not the only target of book challenges: *Macbeth* by William Shakespeare is frequently challenged. Children's books are not immune: both *The Wizard of Oz* by Frank Baum and *Sylvester and the Magic Pebble* by William Steig have been challenged. Topping the list of challenged books is probably the most famous piece of 1800's American literature--*Huckleberry Finn* by Mark Twain--and an equally famous piece of 1900's American literature--*The Catcher in the Rye* by J.D. Salinger. Critics of public education have also challenged various health curriculums, such as *Positive Action* and *Know Your Body*. Two particularly "1990's" works that have come under recent criticism are *Heather Has Two Mommies* and *Daddy's Roommate*, both of which try to teach younger children to understand alternative lifestyles.

1998 List of Challenged Books, from the ALA

The Chocolate War, by Robert Cormier ("sexually explicit")

Of Mice and Men, by John Steinbeck ("offensive language," "unsuited to age group")

Goosebumps Series and *Fear Street* Series, by R. L. Stine ("too frightening for young people," "depicting occult or satanic themes)

I Know Why the Caged Bird Sings, by Maya Angelou (explicit description of a rape and other sexual abuse)

The Giver, by Lois Lowry ("violent," "sexually explicit," "offensive language," treatment of infanticide and euthanasia)

Always Running, by Luis Rodriguez ("sexually explicit," "violent," "racist," and "unsuitable for teens")

Crazy Lady, by Jane Leslie Conly ("offensive language")

Blubber, by Judy Blume ("offensive language," "inappropriate for its intended age group of preteens")

Can a Library Reject (or Not Choose) a Book?

The first question a librarian must consider under the First Amendment is whether the library can decide not to purchase a specific book–or perhaps reject a copy of the book that has been offered to the library. With regards to school libraries, the Supreme Court has noted that a school board has a substantial legitimate role in deciding what should go in the library in the first place.[22] At least one court has found that the school board "[c]learly . . . can determine what books will go into a library and, indeed, if there will be a library at all".[23] Part of the reason why book removals are scrutinized more carefully than acquisitions is that it is assumed that school officials approved of--or at least did not object to--the content of the book at the time the book was placed in the library.[24]

Most of the reported cases that have mentioned a school board's "right" to determine what should go into a school library were actually cases where books were being removed from a library; as such, their language regarding the acquisition of books is irrelevant to the actual decisions and would not be given much weight by later courts. The only case that purported to consider the issue of acquiring books was *Minarcini v. Strongville City School Dist.*, 541 F.2d 577 (6th Cir. 1976),[25] in which the court began its opinion by setting forth four issues: what sort of books should be (1) selected as high school text books; (2) purchased for a high school library; (3) removed from a high school library; or (4) forbidden to be taught or assigned in a high school classroom. *Id.* at 578. The books at issue were *Catch 22* by Joseph Heller and *God Bless You, Mr. Rosewater* and *Cat's Cradle* by Kurt Vonnegut. The court then noted that "[n]either the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books."[26]

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[22] *Board of Education v. Pico*, 457 U.S. 853, 870, 102 S.Ct. 2799, 2810 (1981). However, despite this language the Court specifically noted that it was only considering the removal - and not the acquisition – of books in *Pico*.

[23] *Right to Read Defense Comm. v. Sch. Comm. of the City of Chelsea*, 454 F.Supp. 703, 711 (D. Mass. 1978).

[24] *Pico*, 457 U.S. at 862, 102 S. Ct. at 2806.

[25] *Case v. Unified Sch. Dist. No. 233*, 908 F.Supp. 864 (D. Kan. 1995) should have considered the issue of acquiring books: a gay rights organization offered to donate *Annie on My Mind* and *All American Boys* to the school libraries. Not only did the superintendent reject the donations, but he had the copies of *Annie on My Mind* that were already in the library removed. Despite the obvious acquisition issues (*All American Boy* was

Despite this promising (for our purposes) start, and despite the fact that the question of whether to purchase *God Bless You, Mr. Rosewater* is mentioned several times, the vast bulk of the *Minarcini* opinion focuses on whether to remove *Catch 22* and *Cat's Cradle* from the library. There is no separate analysis on whether school boards are held to different or the same standards when they decide not to purchase specific books. Despite the above language about choosing particular books, the end result of the opinion is that the acquisition of *God Bless You, Mr. Rosewater* and the removal of *Catch 22* and *Cat's Cradle* are treated the same.[27] In analyzing the difference between acquiring books and removing them as set forth in *Minarcini*, one law review comment noted the following:

> Selection of books to be shelved ... requires choosing from an infinite variety of books since no public high school facility has the cataloguing staff, the space, or the budget to carry more than a fraction of published works that might be mentioned in class. Employing content as one of many criteria in textbook selection is different from adopting content as the sole basis for excising a particular book. The countervailing government interests – scarce funds, limited personnel, and restricted space – that outweigh the constitutional interests of students in a book selection situation disappear when school officials remove a particular book merely because its content is offensive to their personal tastes.[28]

Under the above rationale, the discretion involved in acquiring books exists more in the general than in the specific. In other words, a school that gets sued with no prior warning simply because its library does not contain a copy of *Huckleberry Finn* could defend on the ground that it exercised its discretion in choosing how

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rejected and had never been in the library), the court focused entirely on whether the removal of the current copies violated the First Amendment.

[26] Id. at 582.

[27] And again, the school district lost the fight. The school board ignored the recommendations of its committee concerning the books, and the only written justification for removing the books came from the *minority* report made to the board, which contained the following "analysis": "The book [*God Bless You, Mr. Rosewater*] is sick. One secretary read it for one-half hour and handed it back to the reviewer with the written comment, 'GARBAGE'." *Id.* at 581. It's no wonder the decision to remove the book was viewed somewhat skeptically by the court, if the reviewer had his secretary read the book in his place.

[28] *Right to Read*, 454 F.Supp. at 713 n.16 (citing Note, Student's Right to Receive Information Precludes Board's Removal of Allegedly Offensive Books from High School Library, 30 Vand.L.Rev. 85, 98 (1977)).

to spend its limited budget to purchase books for a limited space; a school that was offered a copy[29] of *Huckleberry Finn* and declined it based on its contents and theme would face the same difficulties as a school that removed *Huckleberry Finn* from its library because of complaints.

Can a Library Remove a Book?

The main question that usually confronts librarians is whether a library can remove a copy of a book that already exists in the library. The Supreme Court issued its definitive ruling on school libraries and the First Amendment in *Board of Education v. Pico*.[30] In *Pico*[31], several board members attended a conference where they were given a list of books described as "objectionable" and "improper fare for school students."[32] Upon returning to the school district and determining that ten of the books existed in the district's libraries, the board ordered that all copies of the books be sent to the board office for review. The newspapers caught wind of the directive, and the Board issued a press release in which it called the books "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy." The Board then appointed a committee to review the books. The committee recommended that five books be retained, two be removed, and one be made available to students only with parental approval. The committee could not agree on the last three books. The Board substantially rejected the committee's report and removed nine of the ten books from the libraries, giving no reason for rejecting the recommendation of the very committee that it had appointed.

In a fractured decision, a plurality[33] of the Supreme Court emphasized that the First Amendment not only protects speech, it protects the rights to receive information and ideas and to disseminate them to others.[34] The Court noted the special place of a library--"a place dedicated to quiet, to knowledge, and to beauty"[35]–

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[29] I am not suggesting that the First Amendment issue would turn on whether the book was donated or whether it has to be purchased; a librarian who admitted that she specifically considered purchasing *Huckleberry Finn* but decided not to because of the contents and themes would create the same First Amendment problems as a librarian who removed the book from the library.

[30] 457 U.S. 853, 102 S.Ct. 2799 (1982).

[31] 457 U.S. 853, 102 S.Ct. 2799 (1982).

[32] The books were *Slaughter House Five* (Kurt Vonnegut); *The Naked Ape* (Desmond Morris); *Down These Mean Streets* (Piri Thomas); *Best Short Stories of Negro Writers* (Langston Hughes, ed.); *Go Ask Alice* (anonymous); *Laughing Boy* (Oliver LaFarge); *Black Boy* (Richard Wright); *A Hero Ain't Nothin' But a Sandwich* (Alice Childress); *Soul on Ice* (Eldridge Cleaver); and *A Reader for Writers* (Jerome Archer, ed.).

[33] Because there was no clear majority decision in *Pico*, it is not considered binding precedent. However, a number of lower courts that have considered the weight to be given the *Pico* plurality decision have determined that *Pico* should guide a court's book removal analysis, despite its lack of a majority opinion. *See, e.g., Case*, 908 F.Supp. at 875; *Campbell*, 64 F.3d at 189-90.

[34] *Id.* at 866-67, 102 S. Ct. at 2808 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S. Ct. 1407, 1419 (1978); *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S. Ct. 1678, 1680 (1965); and *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S, Ct. 1243, 1247 (1969).

[35] *Id.* at 868, 102 S. Ct. at 2809 (citing *Brown v. Louisiana*, 383 U.S. 131, 142, 86 S. Ct. 719, 724 (1966) (opinion if Fortas, J.)

under the First Amendment and declared that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[36] Because the selection of library books is a matter of free choice, the Court rejected the school district's claim that it had an absolute right to determine curriculum. The Court then ruled that a school board may not "remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."[37] In other words, a book removal decision that is substantially motivated by an intent to suppress particular ideas violates the First Amendment.

The dissenting justices rejected the idea that students are "entitled" to have access to particular books at school. They argued that school boards necessarily must make content-based decisions about the appropriateness of particular materials. If parents are dissatisfied with the school board's choices, the voters may elect new school board members.

One of the more interesting book-banning cases is *Delcarpio v. St. Tammany Parsih School Board*,[38] which involved a challenge to a book called *Voodoo & Hoodoo*. *Voodoo & Hoodoo* was described as a generally scholarly work tracing the development of tribal religions in Africa and their transfer to African American communities in the United States. One section of the book contained a detailed discussion of various voodoo "spells," including directions for casting the spells and lists of needed ingredients. In what is fairly common for book banning cases, the original complaint about the book was filed by a parent of a seventh grade student who had discovered the book hidden in her house. In addition to contacting the school, the parent contacted the local chapter of the Louisiana Christian Coalition; it appears from the decision that the Christian Coalition took the lead at that point in seeking to have the book removed.[39]

The book was processed through the school district's procedures for considering complaints about library books. The school-level committee, the district-wide appeals committee, and the superintendent all found that the book was educationally suitable for 8th grade Social Studies and that the book should be retained in a reserved section of the library, available only to 8th grade students with written parental permission. The three recommendations were nearly unanimous, with the sole exception being Robert Womack, the board member who sat on the appeals committee. At the June 11, 1992 board meeting, the Supervisor of Instruction presented the recommendation and initially agreed with it. When Mr. Womack asked for her personal view of the book, however, she stated that she did not see any value in material that supported witchcraft, and that she chose "to agree with the word of God."[40] Mr. Womack moved that the book be removed from all school libraries, and the Board voted 12-2 to remove the book.

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[36] *Id.* (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967)).

[37] *Id.* at 872, 102 S. Ct. at 2810 (internal quotations omitted).

[38] 865 F. Supp. 350 (E.D. La. 1994), *rev'd*, 64 F.3d 184 (5th Cir. 1995).

[39] For example, the only community member to speak out about the book at the June 11, 1992 board meeting was the chairperson of the Louisiana Christian Coalition, who presented the board with a petition circulated by the Christian Coalition that contained 1600 signatures.

The District Court acknowledged that under *Pico*, the Board could not remove the book if it was motivated by disagreement with the views expressed in the book. Rejecting the argument that the removal was a curriculum decision, since the book was not required reading and was merely a supplemental resource in the library,[41] the court examined the various motives of the Board members in voting to remove the book. Some were clearly motivated by what they viewed as a conflict between the religion of voodoo and the values and mores of the local community. A number of the board members testified that they were concerned about the dangerous ideas expressed in the section on spells, and by their fears that some of the students might try to reproduce some of the more dangerous spells. The court agreed that this faction of the board "determined that the book was educationally unsuitable for young children because they perceived that the ideas contained in the book may be dangerous to those children."[42] After determining that a majority of the board members had voted to remove *Voodoo & Hoodoo* "in order to deny students access to ideas that the Board members deemed to be offensive, inappropriate, or dangerous," the court ruled that "dangerous" ideas could not be distinguished from other protected ideas.[43] In rejecting the claim that the Board was motivated by the educational unsuitability of the book, the court was clearly influenced by i) the fact that the two committees of professionals to have considered the book deemed it educationally suitable; ii) the Board removed the book from the high school library, despite its professed concern only with younger students; and iii) at least six members of the Board had not read the entire book, but only excerpts provided by the Christian Coalition and one of the Board members.

Some observers of book-banning disputes have noted that some special interest groups appear to have adopted a very devious tactic, perhaps as a means for garnering publicity about their cause: they publicly offer to donate controversial books to libraries, knowing that the books already exist in the libraries; they wait for public controversy to build over their donations; and they then reveal – again, publicly – that the library already contains the very books that the public is denouncing. This almost guarantees that the books will be removed from the libraries.

For example, in *Case v. Unified School District No. 233*,[44] an organization advocating gay rights offered to donate two books to the school library, including Annie on My Mind, which dealt with a fictional romantic relationship between two teenage girls. The school board not only rejected the offer but, after discovering that Annie on My Mind was already in the school's library, removed it. The court ruled that removing the book was unconstitutional, where it was clear to the court that the school board members who voted to remove the book did so because they disapproved of the book's homosexual content. In all likelihood, the school board was set up by the gay rights organization.

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[40] *Id.* at 354.

[41] *Id.* at 354-55.

[42] *Id.* at 357.

[43] *Id.* at 361 (citing *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987)).

[44] 908 F. Supp. 864 (D. Kan. 1995).

So when can a school district remove books from its library? The Supreme Court agreed that books may be removed if they are "pervasively vulgar" or not "educationally suitable" for the students in question.[45]

Objectionable Language

Although school districts do have some discretion to remove books because the language of the books is objectionable, that right is not absolute. In *Right to Read Defense Comm. v. Sch. Comm. of the City of Chelsea*, 454 F.Supp. 703, 711 (D. Mass. 1978), the school board removed an anthology of poetry called *Male and Female Under 18* from the library because a single poem called "The City to a Young Girl" contained sexual language.[46] The president of the school board called the poem "low down dirty rotten filth, garbage, fit only for the sewer."[47] The court called the poem "tough, but not obscene."[48] Noting that certain words are often chosen as much for their emotive force as their substantive meaning,[49] the court ruled that the school board could not remove a book solely because it was hostile to the book's language and themes.

Right to Read is a good example of how bad facts make bad law. The school board ignored the recommendations of its experts (the superintendent and the librarian) regarding the book and focused solely on the one poem, to the exclusion of the entire rest of the anthology. The board president showed an almost irrational vehemence towards the book, to the point where he actually demanded that the librarian be reassigned for purchasing the book in the first place. The "Right to Read Defense Committee" that brought the suit was apparently a group of teachers, and the president wrote an editorial stating that the board might seek the resignations of those teachers. While in the end the court appeared to simply disagree with the board's evaluation of how bad the language in "The City to a Young Girl" actually was, it was clearly affected by the school board's behavior as it considered the poem.

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[45] *Pico*, 457 U.S. at 871, 102 S. Ct. at 2810.

[46] The first line of the poem is:
The city is
One million horney [sic] lip-smacking men
Screaming for my body.
It gets more graphic as it proceeds.

[47] *Id.* at 708. The board president remained a true gentleman to the end, however: prior to the first board meeting held about the poem, he distributed copies to the three other male board members, but not to the three female board members because of the "crude" and "offensive" language. He also testified that he assumed that at least two of the female board members would accept his characterization of the poem. *Id.* at 707.

[48] *Id.* at 714.

[49] *Id.* at 714 (citing Cohen v. California, 403 U.S. 15, 26, 91 S. Ct. 1780, 1788 (1971)).

The courts are also sometimes suspicious of "objectionable language" as the basis for removing books. In *Sheck v. Baileyville School Committee*,[50] the school banned a book from the school library for its "objectionable" language. No standards or rules existed for reviewing the book, and not all committee members had read the book before banning it. The court held that the ban was unlawful, noting that the ban extended to mere possession of the book anywhere on school property.

The courts have also stated that the fact that disputed books may be available at sources outside the school library (*i.e.* the public library or bookstore) does not justify removing them from the school library.[51]

Ten Steps (More or Less) to a Litigation-Free Library

There are a number of practical steps a school district can take to ensure that any decision it makes regarding whether to remove a book from a library or not will be found constitutional. First, all school districts should have in place a procedure for receiving and processing book challenges from the public. Because the *Pico* Court emphasized that local community values will govern what is considered "educationally suitable,"[52] many school districts have established "review committees" to review challenged books and offer recommendations regarding those books. Review committees are two-edged swords, and every effort should be made to ensure the objectivity and reliability of the committee in advance of any challenges. We offer the following suggestions for creating and utilizing review committees:

- Establish the membership of the committee, or at least the types of members (*i.e.* parents, teachers, administrators) in advance and stick to those guidelines. Ad hoc committees of shifting membership may increase the appearance that the committee is unreliable. The courts will be suspicious of a committee composed entirely of parents, especially the parents who complained about the book in the first place. Parents will be suspicious of a committee composed entirely of the librarians who would not remove the books when they complained informally to the librarians.

- Each committee should include at least one "professional reader," such as a librarian or an English teacher. Such persons are important for establishing whether the challenged book is educationally suitable, or, perhaps, whether the book is simply poorly written. Because "educationally suitable" will vary based on the age of intended audience, the librarian or English teacher should be from the same school level (*i.e.* elementary, high school, etc.) as the students who will be reading the book.

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[50] 530 F.Supp. 679 (D.Me. 1982).

[51] *Minarcini v. Strongville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Case*, 908 F.Supp. at 876 ("The availability of Annie on My Mind from other sources does not cure defendants' improper motivation for removing the book.")

[52] *Pico*, 457 U.S. at 864, 102 S. Ct. at 2806

- Some school districts include a board member as a committee member. If the school board will eventually make the final decision regarding the book based on a recommendation from the committee, the district may want to consider not having a board member on the initial committee to preserve the objectivity of both the committee and the board. If the district wants to include a board member on the initial committee, the district should either i) assign a board member to the committee randomly or as part of a pre-established rotation; or ii) have one board member permanently assigned to the committee before any challenges occur. What the district should avoid is allowing board members to volunteer for the committee after they have learned the identity of the challenged book, or based upon their interest in the challenged book; this could lead to a charge that the interested board member has biased both the committee and the board. If one board member is assigned permanently to the committee, it should be someone who does not have any predispositions for or against removing books.

- During the review process, do not remove the book from the library; instead, place the book on reserve and require permission slips from parents to check the book out.

- All committee members should be willing to testify that they read all or a substantial portion of the challenged book. Nothing will destroy the committee's credibility with a court faster than if the committee members admit that they voted to ban a book they never read.

- The committee should issue a report stating the reasons for the decision and citing specific portions of the book to support those reasons. Removing a book because of "pervasive vulgarity" is fine, but someone had better be ready to step up to the plate and tell the Court what they specifically thought was vulgar--the Court will ask. A written report detailing the reasons at the time of the decision will lessen charges of post-hoc rationalization. Including a "minority report" from any dissenting committee members is certainly permissible, but the "minority report" author should be encouraged to be as detailed and specific as the "majority report" author.

The reason why review committees are a two-edged sword is that once the school board has established them, it has to live with their recommendation. It is not a coincidence that in virtually every reported case where a school district was found to have unconstitutionally removed a book from a library--including *Pico*--the school board ignored the recommendation of the review committee that it had originally established.[53] This is not to say that the committee's recommendation will never be wrong, or that the school board can never reject the committee's recommendation. However, if the school board decides to reject the committee's recommendation, it should do two things first: one, READ THE BOOK. A school board that bans a book it has never read over the recommendation of a committee that studied the book in detail is asking for a world of trouble. Second, the board should issue a written opinion stating not only the reasons why it is removing the book, but the reasons why it is rejecting the committee's recommendations. The Supreme Court in *Pico* was clearly affected by the fact that the school board did not explain why it had rejected the committee's recommendation.

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[53] *See, e.g.*, *Case*, 908 F.Supp. at 876 ("The highly irregular and erratic manner in which defendants removed Annie on My Mind from the District's libraries and their disregard of established policy and procedure are important evidence of their improper motivation.").

The school board should also consider that there are more options open to it than simply keeping or removing the book.[54] A book that is unsuitable for elementary school students may be appropriate for high school students, so the elementary library copies could be moved to the high school. Even within a library the school could limit the age groups allowed to view the book, or the library could put the book on special reserve and require a permission slip from a student's parents to use the book.

So (Getting Back to the Topic of the Paper), What is the Internet?

So is the Internet more like a school library or a school newspaper? The obvious–and easy–answer is to analogize the Internet to a library, with millions of "books" (web pages) that students can check out by browsing via the school's computers. Under *Pico*, a school would have a legitimate role in deciding whether students should have access to the Internet at all, and, if so, the web pages to which the students should have access. Once students have access to a web page, however, schools would be prohibited from blocking access to the web page "simply because they dislike the ideas contained in those [web pages] and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.'" Schools still could regulate web page access on the basis of obscenity, but they would be prohibited from blocking access to web pages that, for example, espoused racist or sexist viewpoints.

So goes the analogy. The comparison between Internet and school library is easy, obvious–and ultimately wrong, because it ignores the fundamental differences between books and web pages. One of the underlying reasons that the courts are so suspicious of schools that remove books from their libraries is that the schools are presumed to have exercised their "substantial discretion" in selecting the book for the library in the first place, and when a school removes a book that it had at one point "approved" for the library, there is a natural suspicion that the removal was based on someone's objection to the content of the book.

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[54] *See, e.g., Case*, 908 F.Supp. at 876 ("In addition, defendants did nor consider or discuss less restrictive alternatives to complete removal of the book. This is also persuasive evidence of improper motivation.").

Books are static sources of information; the copy of *Catcher in the Rye* that you removed from the library this week tells exactly the same story–and espouses exactly the same viewpoints–as it did when you bought it last year. Web pages, however, are anything but static. They change all the time; a webmaster might add material to a web page, delete other material from it, and then upload the completely different "version 2.0" of the page–all in the same month. The web page that your school librarian approved for viewing last semester might be completely different–and wholly inappropriate–this semester. In addition, whereas books are self-contained sources of information, an approved web page might contain links to other web pages over which the school has even less control. Your school's Internet provider may limit student's direct access to 100 web pages–but if those 100 pages each have 10 links, students have immediate access to 1000 web pages that nobody at the school has ever seen. And the links on a web page change even faster than the substantive content of the page. Lastly, a school has real control over what books are allowed within the four walls of the school library. A school, however, has no control over what web pages are added to the Internet.

So the Internet is not a normal "library." It is a library where non-students are allowed to write in the books; where the entire content of the books can change at a moment's notice; and where strangers are allowed to add whatever books they want without the librarian's knowledge. A court cannot assume that a school knows the specific web pages to which it is allowing access, and it cannot assume that a web page blocked by the school's blocking software–which by its very nature is usually both under- and over-inclusive–was blocked because the school district disapproved of the content of the webpage. The analogy between Internet and library is imperfect–sometimes fatally so. Schools must have greater flexibility in dealing with the ever-changing Internet.

The Internet and Public Libraries: Mainstream Loudoun v. Board of Trustees of the Loudoun County Library

Despite the obvious First Amendment implications of a government body regulating access to the world's greatest collection of free speech, to date there has been only one published court decision considering a challenge to a public library's use of commercial software to regulate what websites library users may view. In ***Mainstream Loudoun v. Board of Trustees of the Loudoun County Library***,[55] Judge Brinkema of the Eastern District of Virginia considered a challenge brought by an association of library patrons and various other plaintiffs to the Loudoun County library board's decision to use a software called "X-Stop" to screen out various websites that they considered harmful to juveniles. The library board's "Policy on Internet Sexual Harassment" required that all library computers with Internet access be equipped with X-Stop in an effort to "a. block child pornography and obscene material (hard core pornography)" and "b. block material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft core pornography)."[56] The Policy provided that anyone denied access to a blocked site could submit a written request stating their name, telephone number and a detailed explanation of why they desired access to the site. The library staff would then decide whether to unblock the site.

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[55] 2 F.Supp.2d 783 (E.D. Va. 1998) and 24 F.Supp.2d 552 (E.D. Va. 1998)

[56] 2 F.Supp.2d at 787.

The plaintiffs claimed that X-Stop blocked their ability to access websites that did not fall under either of the two protected categories, such as the Quaker Home Page, the Zero Population Growth website, and the site for the American Association of University Women-Maryland. The plaintiffs claimed that there were no clear criteria for determining what got blocked, and that the unblocking policy chilled the plaintiff's receipt of constitutionally-protected material.

The first ***Mainstream Loudoun*** decision-- 2 F.Supp.2d 783 (E.D. Va. 1998)--dealt with a Motion to Dismiss filed early in the lawsuit. After dealing with a number of immunity issues raised on behalf of the individual Defendants,[57] and a standing challenge to both the individual plaintiffs and to Mainstream Loudoun itself,[58] the court turned to the First Amendment challenge to the Policy. The court began by noting that the parties had agreed that "the most analogous authority on this issue is *Board of Education v. Pico*." The parties sharply disagreed on how *Pico* should apply to the Internet. The Library analogized the Internet to a "vast Interlibrary Loan system," and argued that blocking websites was the cyberspace equivalent of deciding not to acquire a book in the first place--an issue that *Pico* specifically declined to address[59] and that some courts have held raises far less of a First Amendment issue than removing books from the library. The plaintiffs, however, argued that the Internet is a "single, integrated system" akin to a set of encyclopedias, from which the Library had decided to "black out" certain articles based on their content.

The court sided with the Plaintiffs' view of the Internet. The court opined that the amount of work needed to block a website was more akin to removing a book from a library: "[u]nlike an Interlibrary loan or outright book purchase, no appreciable expenditure of library time or resources is required to make a particular Internet publication available to a library patron." The court noted that the Supreme Court had called the Internet a "vast library including millions of readily available and indexed publications," the content of which "is as diverse as human thought."[60] The court then concluded that:

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[57] The court ruled that under *Bogan v. Scott-Harris*, 118 S. Ct. 966 (1998), the Library Board and its individual members were immune with respect to their decision to adopt the policy, but that they were not entitled to legislative immunity for their role in enforcing the policy. *Mainstream Loudoun*, 2 F.Supp.2d at 788-89. The court ruled that the individual Defendants were not entitled to immunity under section 509 of the Telecommunications Act of 1996 (47 U.S.C. § 230), which was meant to encourage private Internet providers to self-regulate against offensive material, but not to insulate government regulation of the Internet from judicial review. *Id.* at 789-90. The court ruled that the defendants were not entitled to either Eleventh Amendment or qualified immunity, because the plaintiffs sought only declaratory and injunctive relief. *Id.* at 790. Because the plaintiffs were not seeking monetary damages, however, and because the Library Board was a named defendant, the court did dismiss the individual Defendants as unnecessary, redundant parties. *Id.* at 790-91.

[58] The court ruled that individual Plaintiffs who claimed to have attempted to access the Internet at a Loudoun County library but were blocked from various sites had standing, *id.* at 791, individual Plaintiffs that did not allege that they had ever been blocked did not have standing, *id.* at 792, and Mainstream Loudoun met the requirements for associational standing under *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 97 S. Ct. 2434 (1977).

[59] *Pico*, 457 U.S. at 861-63, 871-72 (plurality opinion).

> To the extent that *Pico* applies to this case, we conclude that it stands for the proposition that the First Amendment applies to, and limits, the discretion of a public library to place content-based restrictions on access to constitutionally protected materials within its collection.[61]

Any content-based restrictions of the Internet, therefore, needed to be justified by a compelling governmental interest and had to be narrowly tailored to achieve that end. Although the Library was not constitutionally required to provide Internet access at all, having chosen to provide access the Library could not then choose to restrict access to certain websites because it disfavored their content.[62]

The court then considered the actual speech that was being regulated. Obscenity and child pornography are not entitled to First Amendment protection at all, so the Library could legitimately restrict access to such websites. The plaintiffs argued that X-Stop, however, restricted access to numerous websites that were neither obscene nor pornographic, and therefore was not narrowly tailored to meeting the Library's legitimate goals. The court also rejected the Library's defense that its unblocking provision saved the Policy. The court noted that the Policy required an official act on the part of a library patron to obtain their protected free speech rights, and opined that requiring a person to petition the Government for access to speech that it clearly disfavored could seriously chill the person's exercise of their speech rights. The court was also concerned that the Policy contained no standards to guide the librarians in deciding what to unblock.

In the second decision from the court (***Mainstream Loudoun v. Board of Trustees of the Loudoun County Library***, 24 F.Supp.2d 552 (E.D. Va. 1998)), the court considered motions for summary judgment filed by both parties.[63] Trying a new tact, the Library argued that something less than a strict scrutiny standard should be applied, because the Library should be considered a non-public forum. After an extensive analysis of the nature of the Library, the Court concluded that it should be considered a limited public forum.[64] The court also rejected the argument that the Policy was more appropriately viewed as a time, place and manner restriction rather than a traditional content-based restriction on speech.[65] Accordingly, the Library's policy could survive strict scrutiny only if its served a compelling state interest and was narrowly drawn to achieve that end.[66]

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[60] *Id.* at 795 (citing Reno, 117 S. Ct. at 2335).

[61] *Id.* at 794.

[62] *Id.* at 795-96.

[63] As in the first opinion, the court dealt with several standing issues. The only issue of any real interest was the standing of a website called "Banned Books Online" ("BBO"). BBO admitted that the Library had never blocked its website, but claimed that the X-Stop software blocked a link from its webpage to a webpage discussing the book "E for Ecstasy." Acknowledging that the Internet is a web of links from one page to another, the court rejected BBO's standing because "[s]uch a result would make a mockery of traditional standing principles." *Id.* at 560.

[64] *Id.* at 561-563.

The Library identified two compelling government interests: i) minimizing access to illegal pornography; and ii) avoiding the creation of a sexually hostile atmosphere.[67] Assuming that these were compelling state interests, the court turned to the question of whether the Policy was necessary to further those interests. The Library was required to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[68] Because the Library could offer only a handful of anecdotal stories from libraries in other cities, and had never had a single complaint that material being accessed on the Internet had created a hostile atmosphere in Loudoun County, the court rejected the argument that the Policy was necessary to prevent sexual harassment or the access of illegal pornography.[69]

Even if the Library could show that the Policy was necessary, it would still have to show that it was narrowly tailored to achieve its stated interests. Analogizing to the Supreme Court's decision in *Sable Communications of California v. Federal Communications Comm'n*,[70] in which the Court ruled that the FCC could not justify a total ban on "dial-a-porn" that was harmful to minors but not legally obscene, by arguing that the total ban was the only possible means to prevent children from accessing indecent material, the *Mainstream Loudoun* court found that there were potentially less restrictive means of meeting the Library's goals that had not been tested.[71] Returning to a theme from its first opinion, the court also found that the Policy was over-inclusive, because it limited the access of adult patrons to what was deemed fit for juveniles:

> It has long been a matter of settled law that restricting what adults may read to a level appropriate for minors is a violation of the free speech guaranteed by the First Amendment and the Due Process Clause of the Fourteenth Amendment.[72]

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[65] *Id.* at 564. The Library argued that under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986), the Policy focused on the secondary effects of i) creating a sexually hostile environment and ii) violating obscenity, child pornography, and harm to juvenile laws. The court noted that the Library's Policy focused on the listeners' reaction to speech, which was not the type of secondary effects referred to in *Renton*.

[66] *Id.* at 563.

[67] *Id.* at 564.

[68] *Id.* at 565 (citing Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664, 114 S. Ct. 2445)).

[69] *Id.* at 566.

[70] 492 U.S. 115, 109 S.Ct. 2829 (1989).

[71] The court noted that privacy screens; having the Library staff "casually monitor" Internet use; designating certain computers for use by minors and installing filtering software on those computers; and installing filtering software that could be turned off when adults used the computers were all less intrusive means of meeting the Library's goals. *Id.* at 567.

[72] *Id.* at 567 (citing Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 2346 (1997)).

The court also ruled that the Policy was unconstitutional as a prior restraint on speech, because the Policy provided neither adequate guidelines to limit the discretion of the librarians nor adequate procedural safeguards. The Library conceded that it did not even know the standards by which the X-Stop software made its blocking decisions, since the software company refused to divulge what it considered to be a trade secret. The Policy lacked time limits for review, a provision for judicial review, and a burden of proof that fell on the censor–all of which have been previously required for prior restraints.

Conclusion

Loving v. Boren, 956 F.Supp. 953 (W.D. Okla. 1997) involved the University of Oklahoma's decision to restrict access to Internet news groups. The university had chosen to operate two separate servers. Server "A" was open to recreational use, but certain disapproved newsgroups had been taken off that server. Server "B" included all available newsgroups–none had been removed--but users of server B had to be "over eighteen years of age, and must "click" on a box that denotes acceptance of specific terms." The terms of use for System B were that the system was only to be used for "academic and research purposes." This restriction was upheld because "the OU computer and Internet services do not constitute a public forum." The college was allowed to restrict access only to "those purposes ... for which the system was purchased."

Many observers, including the American Library Association, have endorsed *Mainstream Louden's* conclusion that blocking software violates the First Amendment. But there is some question whether *Mainstream Louden* will remain the law. The analogy between Internet blocking and "removing a book" may not survive in the long run. Proponents of blocking will argue that the decision to block is closer to the decision not to purchase a specific book, which is not necessarily unconstitutional under *Pico*. The law generally allows libraries discretion to use their limited funds to purchase only those materials that best serve the community's needs. Hence, *Playboy* and *Hustler* are not in most libraries. The judge in *Mainstream Louden* was not persuaded by this argument since, "no appreciable expenditure of library time or resources is required to make a particular Internet publication available to a library patron."[73] But libraries are generally limited in the number of computer terminals they can afford to maintain. Internet computers in many libraries are often full, with sign-up sheets and time limits needed. Such a library might choose to allow users to surf only those sites most compatible with the library's mission because time spent on these sites is time that cannot be spent by other patrons on "traditional" research.

Even if *Mainstream Louden* remains good law, one might question whether this public library case will apply to school libraries. In ***Mainstream Loudoun I***, the court acknowledged that *Pico* might not be applicable to public libraries: "all of the *Pico* Justices, including the dissenters, recognized that any discretion accorded to school libraries was uniquely tied to the public school's role as educator."[74] The court was particularly impressed with Justice Rehnquist's statement that "[u]nlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry."[75] Public libraries, by comparison, "lack the inculcative mission that is the guiding purpose of high school."[76] The court noted that the school children who inhabit public schools have minds and values that are still developing, whereas the adults who for the most part patronize public libraries "are deemed to have acquired the maturity needed to participate fully in a democratic society...." Because *Pico* sets the standards for school libraries, it is doubtful that most courts would give *Mainstream Loudoun* too much weight in determining the constitutionality of using web-blocking software in the public libraries.

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[73] *Mainstream Louden*, 2 F.Supp.2d at 793.

In addition, school libraries will probably not be considered "limited public forums" as public libraries are. To determine whether a library is a limited public forum a court will consider three factors: government intent, extent of use, and the nature of the forum. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1249 (3rd Cir. 1992). In *Louden*, the library had adopted a resolution of intent declaring that its "primary objective ... [is] that the people have access to all avenues of ideas."[77] A school or college library would usually have more of an academic mission. In *Louden*, the library had been opened "to the use of the Loudoun County public at large."[78] A school library is usually open only to students, faculty, and employees. As to the "nature of the forum" the judge in *Loudoun* ruled that the nature of the library's Internet forum was to facilitate open sending and receiving of any communicative materials. Generally, school libraries limit their Internet use to activities related to school or school work. The judge in *Loving v. Boren* concluded that the University of Oklahoma's library was not a limited public forum after considering these factors. If a school is not considered a limited public forum, its Internet policy would only have to pass a balancing test, rather than strict scrutiny.

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[74] *Id.* at 794.

[75] *Pico*, at 915 (Rehnquist, J., dissenting).

[76] *Mainstream Loudoun I*, 2 F.Supp.2d at 795. The court continued to question the applicability of *Pico* to non-school libraries in its second opinion. *See Mainstream Loudoun II*, 24 F.Supp.2d at 561 n.10.

[77] *Mainstream Louden*, 24 F.Supp.2d at 563.

[78] *Id.*

INTERNET ACCESSIBILITY AND USE IN K-12 PUBLIC SCHOOLS

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Abstract

As access to and use of the Internet in K-12 public schools burgeon, school district and building administrators must frequently make Internet-related decisions with little or no legal guidance. This presentation provides an overview of the statutory and case law pertinent to the availability and adoption of Internet-enabled communication and learning in public schools; and, based on this overview, recommends strategies to help school authorities minimize school district liability in Internet-related matters. Issues addressed include students' and teachers' rights to receive information in the public school setting, free speech rights in school-related Internet communications, family privacy rights relative to the Internet, defamation on web sites, copyright limitations for Internet users, and privacy and harassment in e-mail communications.

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Board of Education v. Pico, 457 U.S. 853 (1982), 102 S.Ct. 2799, 73 L.Ed.2d 435 [4 Ed.Law Rep. [1013]] (1982) (Burger, Powell, Rehnquist, & O'Connor, JJ., dissenting)
ACLU v. Johnson, 4 F. Supp.2d 1029 (D.N.M. 1998)
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3. Limiting Teachers' Internet Access

Urofsky v. Gilmore, No. 98-1481, 2000 U.S. App. LEXIS 14484 (2000)
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Boucher v. School Bd. of Sch. Dist. of Greenfield, 134 F.3d 821 [123 Ed.Law Rep. [500]] (7th Cir. 1998)

2. Teachers' Personal Internet Expression

Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)
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III. PRIVACY AND THE INTERNET

A. Family Privacy and the School-Sponsored Internet

Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. § 1232 g

B. Defamation and the School-Sponsored Internet

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IV. COPYRIGHT AND THE INTERNET

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Title II of the Digital Millenium Copyright Act (DMCA), 17 U.S.C.A. § 512

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Religious Technology Center v. Netcom On-line Comm. Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995)
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Zeran v. America Online, Inc., 958 F.Supp. 1124 (E.D. Va. 1997), *aff'd* 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)
Doe v. America Online, Inc., 718 So.2d 385 (Fla. Dist. Ct. App. 1998)

B. Caching

C. Linking

V. E-MAIL AND THE INTERNET

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Title I, II of the Electronics Communications Privacy Act (ECPA) of 1986

Perry Educ. Ass'n v. Perry Local Educators' Assn., 460 U.S. 37 (1983)
O'Connor v. Ortega, 480 U.S. 709 (1987)
Bourke v. Nissan Motor Corp., No. B068705 (Cal. Ct. App. July 26, 1993)
Smyth v. The Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996)
United States v. Charbonneau, 979 F. Supp. 1177 (S.D. Ohio 1997)
United States v. Simons, 29 F. Supp.2d 324 (E.D. Va. 1998)
Wesley College v. Pitts, 974 F. Supp. 375 [121 Ed.Law Rep. [136]] (D. Del. 1997), *aff'd*, 172 F.3d 861 (3d Cir. 1998)
Commonwealth v. Friedman, 47 Ches. Co. Rep. 174 (1999)
McLaren v. Microsoft Corp., 1999 WL 339015 (Tex. App.-Dallas)

B. Sexual Harassment by School-Sponsored E-Mail

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, as amended

Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996), *cert. dismissed*, 518 U.S. 1048 (1996) (citing *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990)
Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 [72 Ed.Law Rep. [32]] (1992)
United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995)
Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 [125 Ed.Law Rep. [1055]] (1998)
Commonwealth v. Hendrickson, 724 A.2d 315 (Pa. 1999)
Davis v. Monroe County Bd. of Educ., 526 U.S. 1629, 119 S.Ct. 1661, 143 L.Ed.2d 839 [134 Ed.Law Rep. [477]] (1999)
United States v. Machado, No. SACR 96-142-AHS (S.D. Cal. February, 1998), *aff'd*, 195 F.3d 454 (9th Cir. 1999)

VI. INTERNET-RELATED RECOMMENDATIONS FOR SCHOOL DISTRICTS

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VII. FINAL COMMENTS

Confidentiality of Services and Records in K-12 Schools

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Confidentiality of Services and Records in K-12 Schools

Introduction: Both teachers and student service professionals [counselors, social workers, psychologists, nurses] provide services and create records subject to scrutiny, in varying degrees, by educators, law enforcement, therapists, other administrators, researchers, anyone approved for access by the parents and the parents. The relationship of the student service professional ("SSP") and the child is based on trust and the need for confidence. It is that relationship that justifies the need for privilege and confidentiality in communications between the parties. The teachers relationship with the child is no less a function of the trust and confidence established with parents, children, and administrators. Both parties provide services and both create records.

This is a discussion, on a limited scale, of the rules, laws, cases, ethics and doctrine that require or support the confidentiality of services and records in schools.

The federal law that applies to all disclosure of information from educational records as well as the release of information concerning services is the Family Educational Rights and Privacy Act. The Family Educational Rights and Privacy Act [1],("FERPA") prevents the disclosure of education records or personally identifiable information describing a student without the permission of the parent or the student if the student is over the age of eighteen (18)

Education records are records that are directly related to the student and maintained by an educational agency or institution.[2] Educational records are not those records kept in the sole possession of the maker of the record and not accessible or revealed to any other person.[3]

Education records include Special Education records (see 34 CFR § 300.560), health records, school counseling records, school psychologist records, school social worker records, administrative records, and disciplinary records. They also include any records directly related to the child and maintained by the institution or a party acting for the institution. Law enforcement (school police) records are not education records and are not subject to the same restrictions on release.

I. Privilege, Confidentiality and the Need to Know.

Privilege is the protection from disclosure in a court of law of information received in a protected relationship such as husband/wife, priest/penitent, lawyer/client, and , in some states, school counselor/student and/or school social worker/client[4]. Privilege is the right of the client, not the practitioner. The Supreme Court has defined the question of privilege under FRE 501 as whether the privilege protecting communications "promotes sufficiently important interests to outweigh the need for probative evidence."[5] State law prescribes what, if any, relationships are privileged in schools. Federal law prescribes the confidential relationships.

Confidentiality may exist as a result of ethical code, statute, rule, or tradition. Confidentiality and privilege are not the same although privilege includes the confidential relationship and is a burden on the practitioner to refrain from disclosure. Confidentiality establishes a duty of the provider to maintain a relationship free from disclosure to anyone without a release of information or a requirement to release in accordance and within the limits of the law.

The need to know is a fundamental discriminator of access to educational records. Educational records and personally identifiable information are protected from disclosure, without release, to any party and by any means including oral, written or electronic media.[6] Educational record information may not be released to any person in the educational institution, or outside the institution, who has not been identified as having a "legitimate educational interest" [7] or who has access to the information without consent of the parent or eligible student. [8] The institution is responsible for determining who has that interest.

Personally Identifiable Information

Personally identifiable information is information that includes the student's name, address, name of parents, social security number, personal characteristics and any other information that identifies the student. [9] Directory information is information in a student's educational record that would not be considered harmful if released. Teachers and SSP's are frequently a source of information concerning the needs of a child by persons outside of school such as grandparents, therapists, physicians and law enforcement. Parents must be given a notice of what personally identifiable information will be included in the directory information. [10] Parents may deny the school the right to release personally identifiable information concerning the student without consent of the parent.

In addition, SSP's are frequently bound by ethical, state statutory and common law guidance concerning confidentiality of communications. This is due to a perceived need for protection of communication between the helping agent and the client. In the provision of those services, the helper needs to have the full disclosure of the client to help that person resolve the problems within that institution or within that persons life. However, parents have the option of refusing to release any of that information to any person outside the school or inside the school who has not been identified as having a legitimate educational interest.

The various codes of ethics describe how important this is to the professions within student services.[11] Student service providers must be concerned with the assessment, planning, intervention and follow-up of students with social, personal, familial, and academic problems. While psychotherapy, per se, is not provided in schools, counseling is usually provided. The relationship between the psychotherapist and her client is no less important than the relation between the "counselor" and her client. The Supreme Court has recognized the importance of privileged relationships in the provision of psychotherapy.[12] State laws define whether the relationship is privileged. Ethics and federal law define the confidentiality of the relationships.

II. Other Issues

Surveys, Analyses or Evaluations

The Protection of Pupil Rights amendment prohibits any student from being required to submit to a survey, analysis, or evaluation that reveals information about, among other things, mental and psychological problems, sex behavior and attitudes and critical appraisals of family members.[13] While this is clearly intended to apply to "instructional materials", the teacher or SSP may be called upon to conduct surveys of students to determine attitudes and beliefs about violence, alcohol and drug usage, diseases, and limited surveys of certain students for instructional purposes such as groups established for counseling. Participation requires informed consent.

Alcohol, Tobacco and Other Drugs

Confidentiality of information concerning the treatment of a minor for an alcohol or drug related problem is codified at 42 USC dd-3 and ee-3. The rules are found at 42 CFR 2.[14] A safe rule of thumb is that no information may be disclosed concerning a student's alcohol and drug treatment without a release from the student. Federal law requires minors to give consent prior to disclosure, even to a parent.[15] This presents a conflict on it's face with the Family Educational Rights and Privacy Act which requires parental consent before any release of any information concerning their child under the age of 18.[16] Student Assistance Professionals providing alcohol and drug services in schools may choose not to provide services without a release of information allowing consultation with the parent. States requiring parental consent before treatment must still have the minor's written release and consent to disclosure.

Health Services

School health records are educational records. Restrictions on the sharing of the records are the same as any other educational record. However, unlike other educational records, most states have statutes that define the extent to which information in health records can be shared. This is particularly true in cases where the health care practitioner is engaged in treatment with a child with a communicable disease. Public health law of the state will describe the actions to be taken in cases requiring a report to the public health officer. However, schools have a special interest in the impact of any release of health information. Inappropriate release of health information can affect the community as well as the family of a child. This has been particularly true in cases of AIDS and hepatitus. A good practice is to never release health information without the informed consent of the parent or eligible student. Each school corporation should establish clear local guidelines for best practices in the protection of health information that includes protection against disclosure of health information concerning a child.[17]

Duty To Warn

State statutory and case law governs to what extent and under what conditions a SSP, or teacher, is required to disclose information concerning a client who is threatening another person or acting in a way that threatens the public health. Usually this includes reporting of child abuse allegations and threats of homicide. The FERPA provides that the educational agency "may" disclose personally identifiable information from an education record if it is necessary to protect the health or safety of the student or others.[18] While the federal law allows disclosure, it does not require it and it does not prevent sanctions of the SSP for violation of privilege statutes at the state level.

A "safety" emergency is relative and a matter of perception. The distinction between an emotional catharsis and a safety emergency may be a matter of professional discretion. Practitioners should seek legal counsel advice concerning state law requirements to disclose threats to the health and safety of others. If a SSP has privileged communication in his state, the information cannot be released unless state law allows the release of information.

Summary and Conclusion

This paper is intended to survey the rules and law concerning the confidentiality of teaching and student services in schools. While the concept of confidentiality is a simple concept, the practice of maintaining confidential relationships in schools is not simple. The need to restrict access to student records includes the requirement to restrict access to those with a legitimate educational interest and a protection of all records from disclosure to include the disclosure of personally identifiable information without parental notification. Confidentiality also includes the requirement to seek informed consent from a parent prior to any analysis, evaluation or survey that seeks information concerning certain private, personal or family information.

Endnotes

1. 34 CFR Part 99, Family Educational Rights and Privacy Act (FERPA)

2. 34 CFR §99.3

3. 34 CFR §99.3 , "Education Records", (b) (1).

4. Black's Law Dictionary. Sixth edition. West Publications. 1990.

5. Jaffee v. Redmond, 518 U.S. 1 (1996). Quoting Trammel v. United States, 445 U.S., at 51.

6. 34 CFR §99.3, "Disclosure"

7. 34 CFR §99.31 (a) (1)

8. 34 CFR §99.31

9. 34 CFR § 99.3

10. 34 CFR § 99.37

11. National Association of School Psychologists. Standards for the Provision of School Psychological Services. Section 3.6; American School Counselor Association. Ethical Standards for School Counselors. Section A-2; American Nurses Association. Code For Nurses. Section 2; National Association of Social Workers. Standards for School Social Work Services. Standard 14.

12. See Jaffee

13. 20 USCA § 1232h

14. The point of contact for policy information and questions on confidentiality of alcohol and drug treatment records is the Center for Substance Abuse Treatment (CSAT), Substance Abuse and Mental Health Services Administration, Department of Health and Human Services at (301) 443-7924.

15. 42 CFR §2.14

16. 34 CFR §99.30 (a)

17. The American School Health Association, National Task Force on Confidential Student Health Information has issued Guidelines for Protecting Confidential Student Health Information. American School Health Association, 7263 State Route 43, P.O. 708, Kent, Ohio 44240. www.ashaweb.org

18. 34 CFR §99.36

Blackstone

and

The Americans With Disabilities Act:

Employment Compliance for Educators

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Abstract

William Blackstone in his Commentaries on the Laws of England (1765-1769) set forth themes that have contributed to several current American laws, including the Americans With Disabilities Act (ADA) of 1990. This paper will first outline specific areas in which the ADA affects employment policies and practices for educators. Suggested ways for educators to implement the ADA in job descriptions, interviewing and the employment process will be presented. Next, the paper will refer to U.S. Equal Employment Opportunity Commission (EEOC) guidelines regarding the ADA and employment. Brief descriptions of certain cases which address employment in education and the ADA will then follow. Finally, Blackstone's possible influences on this important civil rights act will be identified and discussed.

Paying serious attention to the hiring, retention and accommodation of teachers, administrators and staff with disabilities is a new idea to some. Today, after nearly a decade of the passage of the Americans With Disabilities Act (ADA) of 1990, many educators still have little or no structures in place to follow the ADA in the areas of job descriptions, interviewing, hiring, job evaluation, and providing for reasonable accommodations to applicants or employees with disabilities. The ADA was passed into law in order to bring 43 million disabled Americans into the mainstream of American life. The ADA covers employment, facilities, and auxiliary aids and services. It affects all businesses, governments and educational institutions, both public and private (Miles, Russo & Gordon, 1992).

This paper will identify and discuss certain employment requirements of the ADA and Blackstone's possible influence on the ADA, with ideas for educators to consider when implementing the ADA in job descriptions, interviewing and the employment process. Three U.S. Equal Employment Opportunity Commission (EEOC) guidelines regarding the ADA will be presented, followed by cases concerning employment-related ADA issues in education. Finally, statements by William Blackstone in the Commentaries on the Laws of England (1765-1769) will be identified as possible legal and intellectual foundations for the ADA .

The Americans With Disabilities Act

The Americans With Disabilities Act (ADA), known as Public Law No. 101-336, was signed into law by President George Bush on July 13, 1990, to redress the inequities still facing Americans with disabilities. Section 504 of the Rehabilitation Act of 1973 had done much but, 17 years after its passage, many of the 43 million Americans with one or more physical or mental disabilities had little or no recourse in seeking an end to discrimination in areas such as education, employment, housing, and access to public services until the ADA became law. The ADA was hailed as the most sweeping anti-discrimination legislation since the Civil Rights Act of 1964. Its penalties are designed to get attention. They include set damages under Title VII of the Civil Rights Act (1964), a jury trial, the use of state remedies, an internal grievance procedure at the workplace, a completed complaint to a federal agency requesting an inquiry, and not allowing a state to protect itself from litigation by using the defense of sovereign immunity (this sovereign immunity issue might be addressed by the U.S. Supreme Court). Exhaustion of administrative remedies is not required by the ADA, so all of the above suits, grievances and complaints could be done simultaneously.

The ADA defines a disability as:

(a) a non-correctable physical or mental impairment that substantially limits one or more of the major life activities (i.e. hearing, walking, speaking, seeing, breathing, learning);

(b) a record of such an impairment; or

(c) being regarded as having such an impairment.

The ADA affects many areas, but this paper will focus on Title I of the ADA, which is employment. Title I applies to public and private schools. Good faith is a defense under the ADA; thus it is helpful to document efforts made to achieve employment compliance.

Essential Functions

The first step in employment compliance is to add essential job functions to all job descriptions, interviews, and evaluations, and to set up a way to hear requests for reasonable accommodation. The term essential functions refers to the fundamental job duties of the employment position. The employer may decide, with the burden of showing why, what the essential functions of a job are, and which accommodations would be reasonable.

The ADA requires that a person with a non-correctable disability who makes that disability known be considered qualified for a job if he or she can do the essential functions of the job with or without reasonable accommodations. If the essential functions of each job are written in advance of job interviews, these can be used as evidence of what the essential functions are. General essential functions can be written for large groups, such as teachers, counselors, and principals. If there has been no update of job descriptions to include essential functions, there may be no legal defense against a charge of violation of the ADA. Notice of the right of employees and applicants to use the ADA must be given prominently (The U.S. Equal Employment Opportunity Commission [EEOC], 1999a).

Knowing and using essential functions in job descriptions, advertising, interviewing, promotions, and terminations is key to using the ADA. Courts today are enforcing the ADA with educational employers. Three Equal Employment Opportunity Commission (EEOC) guidelines refer to essential functions. They are (a) the EEOC Guidelines on Pre-employment Disability-related Questions and Medical Examinations (1995), (b) the EEOC Enforcement Guidance on Reasonable Accommodation and Undue

Hardship Under the Americans with Disabilities Act (1999a), and (c) the EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1999b).

The Interview

The timing and nature of the job interview changed with the implementation of the ADA. Now, instead of conducting one interview and making the final offer, the interview and hiring process consists of (a) a pre-offer interview, (b) a conditional job offer, (c) a post-offer interview, and (d) a final job offer. It is crucial that all persons involved in the interview and hiring process, including site-based management committees, teachers, staff and secretaries be familiar with the interview and hiring process suggested by the ADA, as addressed in the EEOC Final Guidelines on Pre-Employment Disability-Related Questions (1995).

The timing of interviews now starts with the pre-offer interview, which is based only on questions about the essential functions of the job, and job related tests if the tests are given to all applicants in a job category. Here, it is important not to discuss any disability related questions, nor to conduct medical examinations before a conditional job offer is made. Questions should be similar for all applicants. The questions may be prepared in advance of the interview and should reflect the same essential functions listed in the job description of the respective position. If, in the pre-offer interview, the employer becomes aware, either by constructive or inquiry knowledge, of an applicant's job related disability, the employer may ask what kind of accommodation the job applicant needs, but cannot discuss any disability.

In the pre-offer interview, an employer can ask about an applicant's ability to perform essential job functions with or without reasonable accommodations, about an applicant's non-medical qualifications and skills (re: education, work history, licenses), to describe or demonstrate how the applicant would perform the essential job functions (if this is asked of all applicants in the same job category), whether an applicant can meet the attendance standards, and other items listed in the EEOC Guidelines (1995).

After the pre-offer interview, a conditional job offer can be made. The idea of a conditional job offer was introduced into the hiring process with the ADA. It should be made clear to the job applicant that this is not a final job offer. This is an offer conditioned on the applicant successfully completing the post-offer interview which can include a medical examination related to the essential functions, if such is required of all applicants for a certain job, worker's compensation and other questions, if applicable.

The post-offer interview can be held after the conditional job offer, as part of, or after the medical examination. If the applicant questions the results of the medical examination, a second medical examination may be conducted at the applicant's expense. Here, an employer may ask disability-related questions relevant to the essential functions. Also, post-offer interview questions about one's worker's compensation history, prior sick leave usage, and whether an applicant needs reasonable accommodations to perform the essential functions may be asked. An employer should get a signed release of medical records from the applicant before reviewing or discussing his or her medical history. All ADA medical records must be kept confidential and apart from the personnel files.

After the post-offer interview (which may include a medical examination, worker's compensation documentation, prior sick leave and reasonable accommodation inquiries), a final offer may be made. If, based on information derived from the post-offer interview, the employer decides not to make a final offer, the conditional offer may be withdrawn.

In all of the four steps of the interview and hiring process as noted above, the appropriate questions should be asked. In the pre-offer interview only questions about essential functions should be asked. Then there may be a conditional offer. In the post-offer interview questions about medical concerns, worker's compensation and other items as they relate to the essential functions can be asked. A final offer may then be given. The three EEOC guidelines (1995, 1999a, 1999b) on this can help employers train on lawful interview and hiring methods, and make applicants and current employees aware of their ADA employment rights.

Reasonable Accommodations

After the conditional job offer, and once notice of the need for an accommodation in order for a person to be able to perform an essential function is given (either inquiry notice or constructive notice), the person seeking an accommodation meets with the ADA coordinator, bringing the essential functions of the job in question. The ADA coordinator reviews the essential functions of the job, and, with the advice and consent of the supervisor involved, explores possible accommodations to the job. Information is sought externally and internally on accommodations.

The ADA holds that a person with a known non-correctable disability is qualified if he or she can do the essential functions of a job with or without reasonable accommodations. Current employees who become disabled with a non-correctable disability, as well as job applicants with disabilities, can request reasonable accommodations to do the essential functions of a job.

In considering reasonable accommodations the first question to consider is whether the individual seeking accommodations is disabled, under the ADA. The EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1999b) includes the use of mitigating measures in determining disabilities. The mitigating measures idea is from the U.S. Supreme Court rulings in Sutton v. United Airlines, Inc. (1999), and Murphy v. United Parcel Service, Inc. (1999). While psychiatric disabilities are an important part of the ADA, the concept of correctable conditions or mitigating measures applies to all disabilities covered by the ADA. If the disability is correctable, it is usually not covered by the ADA and there is no need to seek reasonable accommodations in such a case.

The EEOC published the Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (1999a). It is a good idea for the ADA coordinator to name an ADA committee or task force to meet regularly, in confidence, to consider ADA policies and requests for reasonable accommodations. Documentation of all reasonable accommodation requests and their outcome should be kept.

The EEOC Guidance (1999a) states that reasonable accommodations should be considered in three categories: (a) adjustments to a job application process, which should be considered even if it seems unlikely that the applicant will secure the position, if he or she meets the pre-selection requirements of education, et al.; (b) adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed; and (c) modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment, such as attendance at a retirement party.

An employee who cannot do the essential functions of the job with or without reasonable accommodations is not qualified under the ADA. An employer does not have to eliminate an essential function to provide reasonable accommodations, but may do so if he or she wishes.

An accommodation is not considered reasonable if it causes undue hardship, a direct threat, or makes a business necessity impossible. The EEOC guidelines on reasonable accommodation discuss undue hardship. An employer's defense for not granting an accommodation because it would entail an undue hardship means it would be too difficult, too costly, or would fundamentally alter the job.

Undue hardship refers to financial difficulty as well as accommodations that are disruptive or would fundamentally alter the nature of the educational operation. An employer must consider each reasonable accommodation request on a case by case basis, with allowance for the request to be informal (a statement that a function cannot be done because of a medical reason) and for informal interaction with the person requesting accommodations. Suggestions for accommodations should be solicited from the person requesting accommodations, his or her doctor, as well as external and internal sources. Only after such interactions should the defense of undue hardship be considered. Before undue hardship is determined, all possible sources of outside funding should be considered. If undue hardship is determined in a case, the person requesting accommodations should be told why there seems to be undue hardship, and be allowed to respond (EEOC, 1999a).

An employee can request reasonable accommodations at any time during the application process or during the period of employment. The employer may ask for documentation of the disability when an individual requests reasonable accommodations and signs a release of medical information form. Only job related medical information, related to the essential functions, should be requested. A copy of the essential functions of the employee's job should be given to all examining health care providers, so that only job related medical information will be considered. Documentation should specify the existence of an ADA disability (without which there is no ADA coverage) and explain the need for reasonable accommodations.

The employer may choose among different reasonable accommodations as long as the chosen accommodation is effective. An applicant or employee has a right to refuse an effective accommodation. However, if because of such a refusal he or she cannot do the essential functions, he or she may not hold or remain in the job (EEOC, 1999a).

An employer cannot deny reassignment to an open position as a reasonable accommodation to a probationary employee, as long as the employee adequately performed the essential functions before the need for accommodations arose. Otherwise the person would not be qualified. Also, an employer may not tell other employees that an individual is receiving reasonable accommodations.

Cases

The proper use of essential functions, interviewing methods and reasonable accommodations can assist educators in practicing preventive law. Certain recent ADA cases which address complaints in these and others employment-related areas are discussed below.

Public schools and colleges are covered by Title II of the ADA, which is, Public Entities, yet still must follow the employment rules of Title I, and with less administrative requirements in the plaintiff bringing litigation, as seen below.

In Wagner v. Texas A & M University (1996), a professor alleged employment discrimination in violation of the Americans With Disabilities Act (1990). The court held that when filing a Title II claim under the ADA, there is no requirement that the plaintiff file an administrative complaint or otherwise follow the procedural requirements of Title I.

The ADA is being litigated in the courts regarding private and public schools and colleges. The ADA prohibits employment discrimination against individuals, such as parents, who associate with people with disabilities.

In McGrenaghan v. St. Denis School (1997), a teacher with a disabled child claimed violations of the Americans With Disabilities Act (1990). The court held that a genuine issue of material fact existed as to whether the teacher's job transfer was an adverse job action and this precluded summary judgment on her ADA claim.

When courts find a willing violation of the ADA by a school or college, substantial damages may be awarded, including set federal damages, plus any effective state claims. The failure to establish ADA employment-related policies and training including ADA notice, essential functions, interviewing methods and reasonable accommodation procedures could be regarded by the courts as reckless indifference.

In Meling v. St. Francis College (1998), a terminated physical education professor alleged that her termination was because of a perceived disability, and violated the Americans With Disabilities Act (1990). Following a jury trial, the trial court awarded the professor $225,000 in compensatory damages and $150,000 in punitive damages, and ordered her reinstatement. The court held that the evidence was sufficient to compel a rational jury to conclude that the professor was disabled within the meaning of the ADA and that the evidence clearly established that the college acted with reckless indifference to the professor's rights under the ADA and justified an award of punitive damages.

If a teacher or other employee is not qualified under the ADA definition of being able to do the essential functions of the job with or without reasonable accommodations, then that person cannot use the ADA to bring litigation against his or her employer, as seen in the case below.

In Motzkin v. Trustees of Boston University (1996), a former associate professor alleged disability discrimination. The court held that the professor was incapable, with or without accommodation, of performing the essential functions of his job and, therefore, was not a qualified individual with a disability under the ADA.

The cases above illustrate the importance of educators knowing and following the ADA in employment policies and procedures.

Blackstone's Seminal Ideas And The Americans With Disabilities Act

In his four volumes Commentaries on the Laws of England (1765-1769) William Blackstone wrote about certain ideas which could have contributed to the foundations of the Americans With Disabilities Act (1990). Warden (1938) wrote, "[t]he law was particularly inexact in Blackstone's day because the Common Law was still in the formative stages. People in various sections of England held varying beliefs as to what the law was on particular subjects." (p. 152) Blackstone's Commentaries solidified legal thinking. They were widely read in England and America, and constituted an influence on American law. Daniel Boorstin (1941), in considering the importance of social values in Blackstone's writings stated, "[t]he Commentaries ... had a sort of social consistency. It is this kind of consistency, certainly, by which the work attained its vast significance in America." (p.190) A consideration of ideas in the Commentaries which may relate to the ADA follows.

Juries

Blackstone believed in the positive nature of juries. In volume three of the Commentaries on the Laws of England (1769), he described jurors and different trials by juries for nearly 30 pages. He began by tracing the origin of juries to possibly the Britons, and certainly to the earliest Saxon colonies. (Vol. 3, p. 349) He stated, "[u]pon these accounts the trial by jury ever has been, and I trust ever will be looked upon as the glory of the English law." (Vol. 3, p. 378)

Trial by jury is assured for ADA cases by the use of Title VII. Title VII is a statute which addresses discrimination in employment and is used to enforce the employment provisions of the Americans With Disabilities Act. Title VII covers discrimination based on sex, age, race, national origin, religion and disability. The Civil Rights Act of 1991 provides for juries and punitive damages in Title VII cases. Thus Blackstone would probably be in favor of the use of juries in cases involving the ADA.

Common Law And Equity

The use of both common law and equity courts was mentioned at length by Blackstone in volume three of the Commentaries (1769), both in chapter 4 and, with specifics, in all of chapter 27. Blackstone referred to common law and equity as "the separate jurisdictions now existing in England, but which never were separated in any other country in the universe." (Vol. 3, p. 441) Blackstone spoke of the differences between common law and equity. He mentioned that in equity there is no jury, often the mode of proof is the conscience, and he named the injunction as a remedy in equity. (Vol. 3, pp. 432-438) None of these applied to common law. Blackstone believed that equity, used then in Chancery Courts, reflected natural law.

Perhaps because of the influence of Blackstone's Commentaries (1765-1769) on the writers of the U.S. Constitution, both law and equity are included in the U.S. Constitution. Equitable remedies are asked for in many cases involving education as well as the ADA. In 1938, the U.S. Supreme Court joined equity and law, so that today equity and law may be heard in the same court, by the same judge, but with different rules. Both equity and law can be used in cases involving people with disabilities (Miles, 1997, chap. 1).

Today, in America, in a case at common law, there is a judge and often a jury, and the decision is generally informed by legal precedents. In equity, there is no jury and no reliance on legal precedents. In a case heard in equity, the judge could be seen as a Chancellor in England who decided the case based on conscience and what is right, and not on legal precedents. Thus an injunction to stop ADA employment discrimination may be granted at equity, and the reason for the injunction needs no precedent and can be based on a novel cause.

To invoke equity there must be no available remedy at law. Also there must be some likelihood that the person asking for equity would suffer irreparable harm if the injunction or other equitable remedy were not given (Miles, 1997, chap. 1).

Natural Law

Blackstone (1765) stressed the importance of natural law. He stated that "law is a rule of action dictated by some superior being", that "this will of his maker is called the law of nature" and "that man should pursue his own true and substantial happiness is the foundation of what we call ethics or natural law." To apply natural law, "it is necessary to have recourse to reason." "[D]ivine providence .... which in compassion to the frailty, the imperfection, and the blindness of human reason hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation." "Upon these two foundations, the law of nature and the law of revelation, depend all human laws ...." (Vol. 1, pp. 39-42) Blackstone noted that "for when civil society is once formed, government at the same time results, of course, as necessary to preserve and to keep that society in order." "In a democracy, where the right making of laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found.... Popular assemblies... generally mean to do the thing that is right and just." (Vol. 1, pp. 47-49) Blackstone's concept of natural law seems to reflect what is fair and just, especially in a democracy, as noted above.

Blackstone's view of natural law was that of one derived from God. Blackstone stated that "the law of nature, being co-eval with mankind, and dictated by God himself, is of course superior in obligation to any other." (Vol. 1, p. 41) Professor Duncan Kennedy noted that Blackstone "affirmed the congruence of the natural law and the law of England, so that there never was a need for the judge to choose between the two." (Kennedy, 1979, p. 241) The Enlightenment view of natural rights, derived from reason and experience, was different in origin and in application from Blackstone's view of natural law. "The eighteenth-century Enlightenment's doctrine of 'natural rights' is not at all identical with the venerable Catholic and Anglican doctrine of natural law, nor with Blackstone's version of natural law." (Kirk, 1994, p. 1040) To Blackstone, natural law explained and informed the existing legal structure as he perceived it.

When the Americans With Disabilities Act was suggested by President Ronald Reagan and signed by President George Bush, its passage was supported on the basis that implementing the ADA was the right and fair thing to do (Miles, Russo & Gordon, 1992). This idea of passing a fair law is supported by the concept of natural law which Blackstone enunciated so clearly. The concept of fairness influences many American laws, such as due process as found in the Fifth and Fourteenth Amendments to the U.S. Constitution.

The interpretation of readings on natural law and the application of that to judicial opinions influence the concepts of due process and equal protection in modern American law as propounded by such jurists as U.S. Supreme Court Justice Hugo Black. When Black worked to impress upon the American judicial system that the Fourteenth Amendment applies the Bill of Rights to the States, the use of due process and equal protection were referred to as reflecting natural law as understood by Aristotle, Thomas Aquinas, Blackstone and others. (Miles, 1997, p. 15) A due process cause of action, using 42 U.S. Code Section 1983, is often joined with an ADA cause of action where appropriate.

Absolute Rights

When U.S. Congressmen argued in 1866 for the Fourteenth Amendment, the House and Senate sponsors cited Blackstone's classification of the "absolute rights of individuals," stating that these were the essential human rights being conveyed. (Kates, 1983, p. 256, n. 228)

Blackstone (1765) held that there are three absolute rights and five subordinate or auxiliary rights for the individual. The absolute rights are (a) life (which can mean personal security), (b) liberty, and (c) property. These three absolute rights are mentioned, probably due to the influence of Blackstone, in the Fifth Amendment of the U.S. Constitution. "The absolute rights of every Englishman, … as they are founded on nature and reason, so they are co-eval with our form of government; though subject at times to fluctuate and change; their establishment (excellent as it is) being still human." (Vol. 1, p. 127)

Life (Personal Security)

"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." (Vol. 1, p. 127) "Both life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them." (Vol. 1, p. 131) The poor must be cared for. "For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, …." (Vol. 1, p. 131) This concern for the welfare of a person's limbs plus the compassion for the less fortunate could portend openness on Blackstone's part for a law such as the ADA.

Personal security is often referred to as a right not to be harassed. The right to personal security has been considered to apply to stop discrimination such as harassment among prison inmates (Robertson, 1999). By extension, it is possible to posit that the Americans With Disabilities Act was influenced by Blackstone's ideas on the right to personal security. Blackstone spoke of the right of personal security as one of three primary categories of absolute rights that imprisonment or other infirmities did not extinguish.

Liberty

The right to liberty is also often used in articles about discrimination. "This personal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." (Vol. 1, p. 134) The ADA seeks to increase the liberty of a person with disabilities by opening up opportunities for teachers, educational administrators and staff, among others, to make choices to change their situations, including their jobs.

Property

For Blackstone, property was probably seen as the most important of the three absolute rights. "So great, moreover, is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community." (Vol. 1, p. 139) To Blackstone the third absolute right of men, property, was subject only to the laws of the land. In order to protect such a right, the Taking

Clause of the Fifth Amendment to the United States Constitution states, "private property [shall not] be taken …." (Garnett, 1999, p. 120). For many people, it is necessary to have a job in order to acquire private property. Therefore the ADA can assist people with disabilities to gain and keep employment, and thus gain and keep private property. Also, American law recognizes that state statutes, such as a teacher tenure law, can create a property right and thus give the teacher due process rights. (Miles, 1997, chap. 2)

Subordinate (Auxiliary) Rights

"The absolute rights of every Englishman … are founded on nature and reason", Blackstone wrote. (1765, Vol. 1, p. 127) He argued that the three primary rights of life (personal security), liberty, and property – all of which he regarded as natural rights recognized and protected by the common law and statutes of England, would be "dead letters" without the five auxiliary rights. (Cottrol & Diamond, 1991, p. 323, n. 46) "But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment." (Blackstone, 1765, Vol. 1, p. 140) That other method is the subordinate or auxiliary rights, which are:

(a) The constitution, powers, and privileges of parliament.

(b) The limitation of the king's prerogative.

(c) Applying to the courts of justice for redress of injuries.

(d) The right of petitioning the king, or either house of parliament, for the redress of grievance.

(e) The right of having arms for defense.

(Blackstone, 1765, Vol. 1, pp. 140-143)

Legislatures

Blackstone (1765) had a strong belief in the efficacy of legislatures and the statutes they produced. To Blackstone, the legislatures and the monarchy kept checks on each other. "[O]ne of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, …." (Vol. 1, p. 237) Blackstone's belief in legislatures would be justified in the modern use of legislatures to write and pass statutes such as the ADA. The right to petition the legislature has been used often regarding the ADA in congressional hearings, and the vote of congress. The powers and privileges of the legislature have also been utilized to enact statutes such as Title VII, and the Civil Rights Act of 1991 which are used to enforce the ADA.

Executives

On executive power, Blackstone wrote, "[t]he supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen …." (Vol. 1, p. 190) The American executive branch, be it a governor of a state or the president of the United States, has limited prerogatives based on a developing administrative law. One of the remedies of the ADA is the "completed complaint", made to the federal executive branch. Executive orders and the issuing of regulations from federal and state departments are clearly within the purview of administrative law. Thus the EEOC, as a part of the federal executive branch, may issue guidance on the ADA and go to court to challenge a school or business which the EEOC alleges is violating the ADA.

American legal actions regarding the ADA reflect Blackstone's idea on the executive branch and legislation. Blackstone recognized executive power in the monarchy and legislative power in the House of Lords and the House of Commons.

Courts

Although court access was an important subordinate right, there was no separate judicial branch in English law for Blackstone, as is provided for in the U.S. Constitution. While Parliament often heard court cases in Blackstone's time, Blackstone stated that the courts were under the power of the king. Courts were also located in the legislature and reported to the king. (Vol. 1, p. 228) The House of Lords' judicial capacity is treated in volumes three and four of Blackstone's Commentaries (1765-1769). The Americans With Disabilities Act insures the right to court access. The ADA is heavily litigated in American courts.

Remedies in the U.S. federal courts only exist if a statute grants jurisdiction to hear the claim. If jurisdiction is revoked or expressly denied, there will be no remedy – regardless of the right held. (Gareau, 1995, p. 85) Blackstone was very positive about the rights of legislatures to enact statutes and it seems that he would approve of this reliance upon jurisdictional statutes in cases involving ADA causes of action.

Thus the ideas mentioned above which are found in Blackstone's Commentaries (1765-1769) have resulted in influencing and strengthening legal structures in America, which have allowed the ADA to exist and be litigated. Today in America it is incumbent upon educators to know and follow the ADA, including the employment provisions.

Conclusion And Suggestions

To properly implement the Americans With Disabilities Act (1990), it is important to consult the EEOC Guidelines for Interviewing (1995), the EEOC Guidance for Reasonable Accommodations (1999a), and the EEOC Guidance on the ADA And Psychiatric Disabilities (1999b) when addressing applications, job descriptions, interviews, evaluations, and terminations. This paper is not legal advice. All ADA implementation, training and all ADA related actions should be approved by an attorney. Suggested steps in following the ADA in employment are:

1. Name an ADA Coordinator, and also an ADA Task Force or Committee, if desired.
2. Write and communicate the essential functions of each position, and put these in all job descriptions. Use the essential functions also in advertising, interviewing, job evaluations and terminations.
3. Train all job interviewers and all those who will meet applicants, such as secretaries, in the right content and timing of questions, and let no one participate in a job interview until and unless he or she is familiar with the appropriate EEOC Guidelines, and has gone through interview training.
4. Make certain that all job applicants and current employees know about and have access to information regarding the ADA interview and hiring policy and procedures, including information about reasonable accommodations.
5. Give wide notice of ADA rights to all job applicants and current employees, with the name and location of the ADA Coordinator, including how to request accommodations for the application process.

6. Make certain that all parts of the ADA are being complied with, including facilities, employment and auxiliary aids and services.
7. Keep an ADA file. Be sure to keep medical records separate from personnel and other records.
8. Write an ADA self-evaluation plan and an ADA grievance policy and procedure, with input from students, faculty, staff, parents and the public with disabilities.

In following ADA requirements, it is very important to work closely with an attorney to apply legal ideas to the facts of a particular situation, and to watch for any upcoming decisions of the U.S. Supreme Court regarding the ADA. Educational administrators can benefit by showing good faith in actively implementing the employment provisions of the ADA, and thus improve their ability to serve a more diverse population.

Blackstone, in his Commentaries on the Laws of England (1765-1769), exposed and explained ideas that were taken seriously by early American lawyers and the writers of the American Declaration of Independence and the U.S. Constitution. His influence is still important today. The Americans With Disabilities Act (1990) in its suggestion by the executive branch, passage by the legislative branch, in its trial by juries, the possibility of both law and equity being used in judicial decisions regarding the ADA and by its philosophical basis in fairness, reflects some of the major themes of Blackstone's Commentaries.

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RELIGION AND EDUCATION IN NEW ZEALAND

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RELIGION AND EDUCATION IN NEW ZEALAND

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New Zealand has no formal written constitution, and hence no constitutional bill of rights guaranteeing freedom of religion. But the significance of that apparent gap in the scheme of things should not be overstated. In common with all common law countries, New Zealand's legal structures operate against a set of assumptions about fundamental rights. Those assumptions operate as a "common law bill of rights". In practice this means that politicians and legislators are broadly aware of the importance of freedom of religion, and that courts will interpret legislation consistently with that freedom unless it is impossible to do so. And there are no serious examples of statutes that have had to be interpreted in a manner inconsistent with religious freedom – not in the modern era anyway.

In 1990 a statutory Bill of Rights was enacted, entitled the New Zealand Bill of Rights Act 1990. This is not a Bill of Rights that allows legislation to be invalidated by judges. But it does give formal expression to the idea that there is a set of fundamental rights in the background to our constitutional arrangements. It requires that all statutes be read consistently with the Bill of Rights where possible. And, of course, it requires that all executive action be consistent with freedom of religion, as well as the other rights mentioned.

I will deal with the freedom of religion issues that arise in New Zealand education using the American terminology of "establishment" and "free exercise" claims. But it should be noted that the New Zealand Bill of Rights provisions on religion do not use the term "establishment". As with Article 18 of the International Covenant on Civil and Political Rights, and Article 9 of the European Convention on Human Rights, the right is expressed as a positive individual right to freedom of religion, and not as a limitation on the power of the legislature. Sections 13 and 15 of the New Zealand Bill of Rights Act 1990 read:

> SECT. 13. FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION-Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> SECT. 15. MANIFESTATION OF RELIGION AND BELIEF-Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

In keeping with comparative and international jurisprudence, it is generally thought that a right to freedom of religion incorporates a right also to be free *from* religion – that is, to be free of the coercion that is wrought when the state takes a position on a religious matter. This is how the Supreme Court of Canada interpreted the Canadian Charter's right to freedom of religion in the case *R v Big M Drug Mart Ltd* [1] (which concerned Sunday observance legislation enacted for the admitted purpose of enforcing the Sabbath, and not for secular reasons). There is similar authority in the international jurisprudence, although it is there made tolerably clear that the mere *fact* of an official religion is not inherently coercive.[2]

So, even on the "anti-establishment" conception of freedom of religion, where "freedom of" includes "freedom from", the line that demarcates unlawful coercion is not drawn in the same way as in the USA. That point is taken up in the discussion below.

1 The funding of religious schools

Religious and indeed non-religious private schools in New Zealand may seek to "integrate" into the state system of education under the Private Schools Conditional Integration Act 1975 (the "PSCI Act"). Schools that negotiate an integration agreement are then funded operationally as if they were state schools, but their land and buildings remain in the ownership of their proprietors. These schools are allowed to retain their "special character", including (for those that are religious) religious character.

The PSCI Act was a milestone in the development of religious freedom in New Zealand. Its enactment here can be compared to the historic settlement made in Canada upon federation in 1867, whereby state aid to minority Protestant and Catholic schools was guaranteed under Canada's Constitution Act.[3] Australian Catholic schools attained a similar settlement in 1963, under empowering legislation which later withstood a legal challenge seeking to argue that public funding of religious schools was an unconstitutional establishment of religion. And in the United Kingdom state aid is available to the private religious school.[4] But, as is well-known, even in New Zealand, public funding of religiously affiliated schools is prohibited in the United States by the Establishment Clause of the First Amendment. Significantly, however, even in the United States there is significant political pressure to ensure that religious schools receive some benefit from public funds. And a certain amount of assistance – for text books and buses, but not teacher salaries – has been allocated by state legislatures, and passes constitutional muster. Nonetheless, New Zealand's PSCI Act would almost certainly be unconstitutional in the United States, at least on the predominant theories of adjudication under the Establishment Clause. But, of the countries mentioned, it would seem that it is the United States which is out on a limb in relation to state funding of religious schools, and not New Zealand.

New Zealand's approach to funding of religious schools compares well internationally for its generosity and inclusiveness. It permits integration on terms which protect a school's "special character". This could be that of any faith. It is not limited to Christian or theistic groups, nor indeed to religious groups. Hence even schools devoted to a non-orthodox educational philosophy which is not explicitly religious may gain the benefit of public funds. The full text of the definition of special character deserves setting out (from s 2 of the PSCI Act):

> "Education with a special character" means education within the framework of a particular or general religious or philosophical belief, and associated with observances or traditions appropriate to that belief

The definition makes clear that education with a special character embraces two concepts. First, the religious or philosophical character can provide the framework within which education takes place. Second, the education can be accompanied by observances reflecting that belief. The first conception of special education would allow a pervasive and seamless presentation of knowledge within the relevant religious or philosophical framework. This is a suitably broad conception of religious education. I return to this point below.

Recent statistics show the following picture of integrated and private religious schools:[5]

(a) There are 300 integrated schools out of a total of 2784 schools in the country. The vast majority are religiously affiliated schools.

(b) There are a further 119 private schools which have a religious or philosophical affiliation (the latter said to comprise schools operated by a Maori Trust (1), Odyssey House Trust (1), and the Montessori and Rudolph Steiner organisations (3 and 9 respectively)).

(c) Students in integrated schools make up 19.2% of the student population. Private schools comprise 3.3% of students. The balance are in state schools.[6]

The ability for religious schools to integrate, and so to allow parents to ensure a religious education for their children without having to pay for private education, is generally seen as a good thing. I would add that the system appears also to be working well in practice, and in a manner which is conducive to religious freedom. For example, there is at least one respect in which provisions of the PSCI Act could have been applied so as to limit the beneficial impact of the Act upon religious schools, but this has not occurred. This concerns the provisions in the Act that are designed to ensure that at least *some* proportion of teachers will always share the religious faith of the proprietors of the school, and so be able to maintain the school's "special character". Section 65 of the Act provides that there may be a "Director of Religious Studies" if an integration agreement so stipulates, and, further, that the controlling authority of a school may similarly designate a number of teaching positions that are deemed to have "responsibility for religious instruction". The consequence of these stipulations and designations is that the school is then allowed to advertise and select staff who are willing and able to assume responsibility for religious education. The section appears to be premised, in other words, on a world-view wherein the religious and secular can be neatly cleaved, and where religion is conceived as something "extra" that may be added to secular knowledge.

Given that presupposition, it was not inconceivable that the authorities would baulk at allowing the designation of *all* teaching positions at a school as carrying a "responsibility for religious instruction". Yet plainly that supposition would not be shared by many religious institutions, for whom religious faith is likely to pervade all of life and hence all knowledge. And so it is pleasing to note, for example, that the integration agreement of Christchurch's Middleton Grange School made in December 1995 records that *all* its teachers are so designated, and hence that advertisements for any teaching position "shall state that willingness and ability to take part in religious instruction appropriate to the special character of the school ... shall be an essential condition of appointment". So, too, is a "willingness and ability to uphold the special character", which, as we saw above, allows education within the religious framework as well as mere observance of religious exercises.

Similarly, a recent integration agreement in relation to a Muslim school entitles the school's proprietors to appoint up to 90% of positions by way of advertisements indicating that "willingness and ability to take part in religious instruction is a condition of appointment". The special character of that school, and the interconnected nature of faith and knowledge, is emphasised in that agreement with considerable detail (emphasis in the original):

> The purpose of [the school] is to nurture and develop the Islamic way of life through ALL learning experiences, under the guidance of dedicated teachers .... The Islamic ethic is the basis for the school's daily life and there is regular instruction and worship in the Islamic tradition.
>
> Explanation

> By **nurture and develop the Islamic way of life through all learning experiences** it is meant that [the school] is founded on the firm faith in the one and only ALLAH (God) and that the prophet Muhammed (may peace and blessings of Allah be upon him) is the prophet (messenger) of Allah; ...
>
> By **Islamic ethic is the basis for the school's daily life** is meant that: Islamic practice is central to the life of our school. Within this would be included the following ..
>
> – segregation of males and females ...
> – ensuring only halal (permitted) foods are eaten at school ...
> – acting as a continuum and extension of the teaching provided in Muslim homes.

These recent examples suggest that there is a generosity of spirit in the application of the Act which one trusts will endure. It is certainly an approach which is conducive to the freedom of religion (including the freedom to manifest that religion in teaching and practice) which is set out in s 15 of the New Zealand Bill of Rights Act 1990.

There are, however, two additional points I would like to make about integrated schools.

First, one should not over-estimate the degree to which the option of integrating a religious school into the state system resolves issues of religion and rights in education. There are many parents who would desire a quality education in an environment that affirms a religious world-view but who are unable to afford the fees charged by private religious schools. Only a small proportion of such parents are likely to be catered for by integrated schools. This is because most are Catholic schools with, understandably, only limited spaces for non-Catholics. The likelihood of new integrated schools is reduced by the considerable capital costs – integration provides salaries and running costs but not the capital costs of land and buildings. Hence a religious community will need to generate the assets required to establish a school to the standard required by the state. A considerable contribution could be required from parents. There are two responses one could make to this problem. The first is to press for a system of vouchers which are issued to parents for educational purposes and which could be redeemed at private religious schools as well as state schools. (Whether this completely resolves the problem would obviously depend on the detail of the scheme and the manner in which it deals with capital costs. And vouchers raise some other issues as well.) The second possible response is to ensure that the public schools system, into which a large percentage of religious parents must consign their children, is itself conducive to religious freedom of parents and children.

My second concluding observation about integrated schools is somewhat speculative. It is this: if New Zealand had no PSCI Act, would one be enacted today and what would be the nature of the political debate accompanying its introduction? Imagining this hypothetical problem throws some light on contemporary pressures in the area of religious freedom. On the one hand, there are indications that New Zealand society in 2000 is much more tolerant of diversity than in 1975: the enactment of the Human Rights Act 1993 prohibiting discrimination on numerous grounds illustrates that point. This would suggest, of course, even greater willingness to enact a PSCI Act for it facilitates a religious and cultural diversity, and preserves the ability of diverse groups to pass their beliefs on to their children.

On the other hand, that same contemporary tolerance can manifest itself on occasions in a manner resembling intolerance. This is particularly the case in relation to minority religious belief (and here I include conservative Christian belief). Those religious denominations and faiths which hold to conservative beliefs – about the role of women, say, or the legitimacy of some forms of sex education in schools – are judged by the majority to be out of step with contemporary values. The pejorative label "fundamentalist" is sometimes applied as if this legitimates the imposition of pressures to change those beliefs. The 2000 vision of rights in New Zealand, at least amongst opinion leaders and commentators, tends to emphasise the communitarian vision of rights as enshrined in New Zealand's anti-discrimination statute – the Human Rights Act 1993 – at the expense of the classic liberal vision of rights as set out in the New Zealand Bill of Rights Act. That is to say, rights against discrimination are somewhat higher in the popular pecking order than rights to freedom of expression or religion. I suspect that, at the very least, the potential conflicts between religious rights and rights against discrimination would be more keenly appreciated and articulated now than they were in 1975. Indeed, the period from 1975 to the present has witnessed dramatic growth in the number of international human rights treaties to which New Zealand has acceded. While it would be an exaggeration to say that this development itself has heightened consciousness about rights in New Zealand, it has certainly added a new dimension to contemporary debates which are increasingly framed in terms of the country's "obligations" under international law. So far as state funding of religious schools is concerned, it is not totally clear whether the net effect of the new rights culture would be to make New Zealanders in 2000 *more* desirous of protecting religious freedom through allowing "special character" schools, or less (because of the perceived ability of "fundamentalist" schools to perpetuate "discriminatory" religious beliefs at public expense).

For all that, I think that the PSCI Act would still be enacted were it to arise for the first time today. There is still a considerable fund of political tolerance and goodwill in New Zealand, even to minority conservative religions. Nonetheless it would be a different type of debate in 2000, and perhaps a closer call than it was in 1975.

2. Other establishment issues in public schools

The classic issues (in American terms) are school prayer and Bible reading, and religion in the general curriculum. Here, too, there are some significant differences from the American position.

Primary schools are bound by the so-called "secular clause" in s 77 of the Education Act 1964 which provides that primary education shall be "entirely of a secular character". But ss 78 or 78A of the same Act permit (but do not require) a notional school "closure" for up to one hour per week – longer with the Secretary of Education's approval – so as to permit religious instruction or observance on public school property, technically "out of hours". Quite a few schools take up this option. Each school in New Zealand is controlled by an elected Board made up of the local community, and so there is room for considerable diversity. Nothing in the law requires that the religious instruction, if opted for at all, be of any particular faith or denomination. But in practice it is almost entirely Protestant Christian, representing the reality of New Zealand culture and the availability of instructors.

The so-called "secular clause" was conceived in 1877 out of solicitous concern for religious views – to avoid offence to *any* religious denomination by keeping *all* religion out of education. That motivation evokes also the history of the United States Bill of Rights and its First Amendment. In neither case was there any concern to make the practice of religion more difficult. The provisions were written in a religious era, by religious people.

In the late 20th century, however, the conflict lines are not so much between religious denominations as between secularism and religion. Two factors combine to make this conflict increasingly important to some religious groups. The first is that the studied avoidance of religion in the curriculum, or the allusion to religious belief as just one option amongst many personal choices, is seen by some parents to downgrade the importance of religious faith. This type of concern has spawned many a court challenge in the United States of America by religious conservatives. [7] In New Zealand there has been only the occasional similar event which comes to public attention. We have had a kindergarten association declaring that it will not allow hot cross buns at Easter time, and we have had the occasional complaint about the values enshrined in school readers – latterly the ubiquitous Harry Potter – as well as allegations of inconsistency between the way in which Maori spiritual values are presented in the school curricula compared to non-Maori religious values. (The point being made here is that some see schools as very willing to accommodate *Maori* religion because it is indigenous, but not Christianity. Interestingly, Maori have incorporated prayer, mostly theistic or even overtly Christian, into their own public and ceremonial meeting protocol, and so it would not be unusual for a school class, visiting a Maori meeting house for example, or hosting Maori visitors, to pray before meals, and so on.)

A second factor of concern to religious conservatives is the trend toward what is sometimes pejoratively called "social engineering". (As with the label "fundamentalist", the term "social engineering" is, I find, generally unhelpful and seems to be intended as a rhetorical device to discredit the opposing position without directly addressing the issues. It usually means that the person using the word would prefer a different set of values to be inculcated in students than that proposed by those in authority.)

An example is education about sex and sexuality, each of which tends to be a matter of concern to those of conservative religious belief. When state education enters these fields, the opportunity for causing offence, and for undermining the religious authority of parents over their children, increases accordingly. As has been pointed out in other countries in relation to religious instruction, allowing student "opt outs" from this form of education is not always an answer.[8] First, there is peer pressure not to opt out, and second, the idea of opting out presupposes a discrete set of classes in which these values are taught, whereas in fact they may be more subtly diffused throughout English and social studies curricula.

Realistically, there are limits on religious freedom which parents opting for the state system simply have to accept. They are part of living in a pluralistic society. On the whole we are probably better off having a system in which these types of religious freedom issues are not litigated in the American manner, for that does tend to polarise communities. Still, one of the positive spin-offs of the American litigation culture in relation to religious freedom is that the issues are taken seriously and become the subject for reasoned inquiry and debate. In New Zealand it is all too easy to ridicule the hot cross bun edict and other incidents in schools affecting religious belief. Yet the issues raised by these seemingly trivial events are often profound because they raise issues about the very role of education, the concept of indoctrination, and the balance of power between state and citizen.

For secondary schools there is no "secular clause" in the legislation. So nothing is said about the place for religion in secondary education. It is left for each school to make its own decision. Since New Zealand is a much more secular country than the USA this does not translate into vigorous lobbying for more religion in schools. Rather, it is as if religion does not rank importantly or highly enough to even warrant much discussion. So it is that, in many secondary schools, there are still prayers and Bible readings at assemblies (a legacy of older times) and there is no great pressure to remove them. Since a decision to have religious exercises in school assemblies is an executive and not a legislative one, there could always be a Bill of Rights challenge. But the existing law is against success for such a challenge: in 1971 the legitimacy of religious exercises arose incidentally in a case about school discipline, and the New Zealand Court of Appeal held without apparent difficulty that so long as there was an opt out for dissenters there was no legal impediment to such exercises.[9] That was before the Bill of Rights was enacted in 1990 with a positive right to freedom of religion, but I predict the result would be the same today. It is significant, in this age of comparative human rights law, that one of the world's most recent bills of rights is written so as expressly to allow religious exercises in schools (with opt outs): see the South African Constitution.

3. Private (including integrated) schools and employment issues

I deal separately with these schools in order to highlight some specific pressure points in relation to religious freedom issues.

My first point is that the Human Rights Act 1993 applies to these schools, both as private or integrated providers of educational services, and as employers (see s 57 and s 22).[10] The Human Rights Act is New Zealand's anti-discrimination statute, and despite its name is not a broad catalogue of rights. It is the New Zealand Bill of Rights Act 1990 that has that role.

I have already mentioned that the PSCI Act specifically allows schools to integrate on the basis that they may subsequently seek employees with willingness and ability to operate within the "special character" environment. On the face of it, seeking that type of employee could constitute discrimination on the basis of religious or ethical belief. But the Human Rights Act specifically allows "different treatment accorded under the [PSCI] Act" (s 28(2)(a) of the Act). Similarly, private religious schools are permitted to discriminate in employment on the grounds of religious belief (see s 28(2)(b)(ii)).

But if overseas experience is anything to go by there will in due course be problems for private and integrated schools at the margins of these exceptions.

Indeed, the very fact that the continued ability of private and integrated schools to maintain their character rests on *exceptions* from the Human Rights Act sends an implicit message to these schools: that they operate at the borders of acceptability, and if the limits of the permitted exceptions are exceeded, then there may be legal penalties.

One area where this issue could arise is in refusals to hire, or dismissals, premised on grounds other than religious belief. The Human Rights Act allows continuing discrimination by private schools on the basis of religious belief (which in context means the belief of the employee or applicant for employment) but does not mention any other ground. This means that schools which have particular beliefs that implicate *other* prohibited grounds of discrimination may find that their employment decisions are able to be challenged under the Human Rights Act. An example would be the school that seeks to dismiss a teacher who becomes pregnant out of wedlock, or who separates from his or her spouse, or who lives in a de facto or same sex relationship. Each of these scenarios raises issues for religious schools that are arguably not embraced by the narrow exception allowed to them.[11]

A second potential pressure point for private and integrated religious schools is teacher registration. A 1996 amendment to the Education Act 1989 made teacher registration mandatory by requiring virtually all schools, including private and integrated schools to employ registered teachers or those with a "limited authority to teach".[12]

The criteria for registration in the Act itself require that a candidate be of "good character"; "fit to be a teacher"; "satisfactorily trained to teach"; and "likely to be a satisfactory teacher" (see s 122).

The problem is not so much these terms themselves as the manner in which they might be interpreted. At one time the Teacher Registration Board published its view that the statutory requirements mean that a suitable teacher is one who "promotes cultural safety", who "actively works to counter sexist and racist attitudes", and who can "display non-racist and non-sexist attitudes, and religious and political tolerance". Some of these requirements could impact upon religious groups, particularly those relating to sexism and religious tolerance. More recently the TRB has apparently abandoned that interpretation of its mandate, and in its publications simply restate the statutory tests.

There can be no objection to the imposition of these standards upon teachers in state schools. But it is not inconceivable that these criteria for registration could be applied to some teachers, who are desirous of teaching in religious schools, so as to exclude them on the basis they are not religiously tolerant or committed to the eradication of "sexism" (as those terms are seen by the Board). This could serve, over time, to undermine the distinctiveness of religious communities. Ultimately this could make some religious schools very much like state schools and so undermine the protection of parental religious freedom which the availability of the "private school option" presently protects.

I hasten to add that there is no evidence that the Teachers Registration Board applies the statutory criteria in that manner. I am simply identifying areas of potential conflict.

The pending litigation in Canada over whether the British Columbia Teachers College can properly refuse to certify the acceptability of Trinity Western University as a teacher-training organisation, because of TWU's express requirement that students abstain from homosexual behaviour, is indicative of the potential issue.[13]

Conclusion

These comments have concentrated on pressure points for religious freedom in New Zealand. I conclude with a general observations about religion and rights in education.

If human rights legislation is now to be the partial embodiment of the values of the state, it is important that room is left for alternative visions of human rights to be articulated and promoted by religious faiths and their schools. The state ought not to have a monopoly on framing the parameters of "right" conduct, at least in areas where there is no broad social consensus. Careful thought needs to be given, in the development and the interpretation of human rights legislation, that it does not come at too high a cost to the autonomy and distinctiveness of religious institutions.

[1985] 1 SCR 295.

[1] See the General Comment of the UN Human Rights Committee, which anticipates that even the maintaining of official state religions will be consistent with the guarantee of religious freedom in Article 18 of ICCPR so long as non-believers and those of other faiths suffer no discrimination as a result: Paragraph 9. GC 22, HRI\GEN\1\Rev 1 at 35 (1994)

[2] See the UN Human Rights Committee Views in *Waldman v Canada* Comm. No 694/1996, CCPR/C/67/D/694/1996 (3 November 1999), to the effect that the limitation of state funding to public and Catholic schools without extension to other faiths is discriminatory, notwithstanding its constitutional mandate.

[3] A valuable source of information as to the state of religious freedom in most countries of the world is K Boyle and J Sheen (eds) *Freedom of Religion and Belief*, Routledge, 1997. Information about Canada, Australia and the United Kingdom is to be found at pp 100, 166 and 314 respectively.

[4] The figures are as at 1 March 1997.

[5] Ministry of Education website http://www.minedu.govt.nz/web/document/document_page.cfm?id=4629&p=1046.1047.1050 visited 13 September 2000.

[6] An interesting account of one such challenge, that in *Mozert v Hawkins County Bd of Education* 827 F 2d 1058 (6th Cir. 1987), cert denied 484 US 1066 (1988), is to be found in S Bates, *Battleground*, Poseidon Press, 1993.

[7] I am thinking here of the position taken in *Abington School District v Schempp* 374 US 203 (1963) and *Zylberberg v Sudbury Board of Education* (1988) 65 OR (2d) 641 (Ont CA).

[8] *Rich v Christchurch Girls High School Board of Governors* [1974] 1 NZLR 1.

[9] The Bill of Rights may possibly apply as well, but for present purposes I do not seek to develop the implications flowing from its application. It is arguable that it adds nothing to the position under the Human Rights Act.

[10] There are issues of interpretation of s 28 of the Human Rights Act which could be addressed here but I will not develop them.

[11] See the Education Amendment Act 1996 in conjunction with Part X of the Education Act 1989.

[12] See http://www.courts.gov.bc.ca/jdb-txt/ca/98/07/c98-0756.txt for the Court of Appeal decision. An appeal to the Supreme Court of Canada is to be heard 9 November 2000.

EMERGING ISSUES IN SPECIAL EDUCATION LAW

Cedar Rapids Community School District v. Garret F. and Related Services under IDEA

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Mediation and the Rights of Children with Special Needs under the IDEA

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MEDIATION AND THE RIGHTS OF CHILDREN WITH SPECIAL NEEDS UNDER THE IDEA

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I) Overview -

a) When Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975, it radically re-altered the power dynamic between school districts and the families of children with disabilities. Prior to enactment, children with disabilities were routinely excluded from mainstream public schools, their placements changed almost at will by administrators without notice to or input from parents. Under the new law, however, children with disabilities and their parents became entitled to a host of substantive and procedural rights designed to ensure full inclusion in the American educational mainstream.

b) For all the changes it wrought, the federal legislation, subsequently re-codified in 1991 and 1997 as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1401 *et seq.* (1997), is short on substantive guarantees for children with disabilities, beyond the requirement that their education be "free and appropriate," 20 U.S.C. §1401(8) (1997), and in the "least restrictive environment". 20 U.S.C. §1412(a)(5) (1997). Rather, the emphasis of the statute is on procedure -- with detailed requirements to ensure parental participation in the initial evaluation and development of a child's educational plan, as well as a complex due process system to resolve disputes between parents and guardians and the school district when initial agreement is not possible. Thus, the statute's due process approach represents the chief mechanism by which parents can exercise influence over the placement of their children in the event of disagreement. The due process system has some built in disadvantages, in particular, a lengthy hearing and appeals process which tends to be long and draining in terms of time, human resources and money. A school district and a family may get locked in conflict for as long as a year fighting over the details of a child's educational plan, severely damaging their working relationship.

c) Over the past two decades, states, responsible for implementing the IDEA's provisions, have developed a variety of alternative dispute resolution mechanisms to provide districts and families a means of resolving their conflicts without resorting to the statute's formal adversarial procedures. Chief among these procedures is mediation. Described as "an extension or elaboration of the negotiation process," mediation involves the intervention of a third-party who has no decisionmaking power. Christopher W. Moore, The Mediation Process: Practical Strategies for

Resolving Conflict, p. 8 (2nd ed. 1996). As an alternative dispute resolution mechanism, it stands somewhere between informal negotiation and more formal arbitration and adjudication. Stephen B. Goldberg, Frank E.A. Sander & Nancy H. Rogers, Dispute Resolution: Negotiation, Mediation, and Other Processes, p. 3 (3rd ed. 1999).

d) In 1997, Congress reauthorized the IDEA and included in the statute, for the first time, a requirement that states create voluntary mediation programs to resolve special education disputes prior to a formal due process hearing. 20 USC §1415 (e) (1997). The impetus to institute mediation programs in the special education context appears to parallel a larger development in the law to expand the use of ADR methods to address disputes in other areas of the law.

e) The central question is whether the substantive guarantees of the IDEA -- inclusive, appropriate education -- can be met without resorting to the statute's due process procedures. Congress assumed a high level of parental involvement when it created the due process system. Many parents may not have the qualities to successfully advocate for the interests of their children. In addition, they often do not have (or access to) the expertise of school administrators to understand the evaluation and placement of their children.

f) Mediation allows the parties to create their own solutions to their problems. Given the context of special education disputes, and the IDEA statute and implementing regulations. can voluntary mediation be used in a manner that is fair to families and children?

II) A Brief Rundown of the IDEA Statute's Requirements--

a) Substantive provisions

   i) A child with a disability is entitled to a "free appropriate education" (FAPE).

   ii) A "child with a disability" is a child "(i) with mental retardation, hearing impairments . . . , speech or language impairments, visual impairments . . . , serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. §1401(3)(A) (1997).

   iii) FAPE is "special education and related services that - (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education . . . ; (D) are provided in conformity with the individualized education program required under Sec. 614(d)." 20 U.S.C. § 1401(8) (1997).

iv) An "individualized education program" is a written statement of a child's present level of educational performance, including, among other information, how the disability affects the child's participation in appropriate activities, a statement of measurable annual goals, benchmarks and short-term objectives, a statement of the special education and related services the child will receive, and a statement of the extent to which the child will not participate in regular education programs. 20 U.S.C. §1414(d)(1)(A) (1997).

v) The statutory language expresses Congress' preference for educating disabled children in the "least restrictive environment." The statute states that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(a)(5) (1997).

vi) The U.S. Supreme Court in Board of Education v. Rowley, 458 U.S. 176, 200-204 (1982), concluded that FAPE meant that the education must provide "some benefit" to the disabled child, but did not require that the educational services enable the child to achieve their maximum potential.

b) Procedural provisions

i) Parents must have written notice before the local school district can evaluate and place a child. 20 U.S.C. §1414(a)(1)(C) (1997).

(1) Notice must clearly and intelligibly explain the procedural safeguards and the actions to be take by the district. 20 U.S.C. §1415(c),(d) (1997).

ii) Parents have a right to review all records and may obtain an independent evaluation of their child at district expense in the event they disagree with the local district's assessment. 20 U.S.C. §1415(b)(1) (1997); 34 C.F.R. §300.502 (1999).

iii) Parents must be present at the meeting of school personnel to design the IEP. 20 U.S.C. §1414(d)(1)(B) (1997).

iv) In the event of disagreement over the IEP, a parent may request a hearing before an impartial hearing officer (along with subsequent administrative and judicial review). 20 U.S.C. §1415(f) (1997).

v) Parents may be entitled to attorneys' fees in the event they prevail at the impartial hearing (or subsequent level). 20 U.S.C. §1415(i)(3)(B) (1997).

c) Limitations of the due process system
    - i) Philosophy of EAHCA/IDEA drafters was that procedural notification and due process provisions, along with parental involvement, would ensure adequate compliance with the statute's goals.
    - ii) Many school administrators and personnel did not welcome the statute's new intrusions into the system. Often, parent involvement is treated with a degree of suspicion by district employees.
    - iii) Parents bear the brunt of the burden of representing the interests of their children. However, many parents are usually less conversant in terminology of special education evaluation and placement. Thus, they may be less effective advocates for their children than hoped by the drafters of the statute. Further, some parents may be better advocates than others, resulting in "better" placements for their children.
    - iv) Formalized procedures may undermine the ability of parents and school district personnel to create a sense of community and the shared goal of educating disabled children.
    - v) In the case of a dispute between parent and school district, parties must resort to a lengthy, costly hearing process followed by appeals to state administrative agencies and judicial review.

III) The Mediation Alternative

a) Use of alternative dispute resolution (ADR) methods increased over the last 25-30 years. A variety of ADR methods used to resolve a multitude of disputes, including custody and visitation arrangements in divorce proceedings, small claims disputes, etc.
    - i) ADR is a continuum of activities – more formal arbitration to early neutral evaluation to mediation.
    - ii) May be court annexed, agreed to by contract or "free standing".
    - iii) Some legal commentators have expressed concern over the use of ADR to resolve disputes involving public rights and litigants with significant limitations (education, race, class, disability, etc.)

b) Mediation described—
    - i) A neutral third party works with the disputing parties to facilitate a resolution. The neutral does not apply rules to determine the outcome nor does the neutral attempt to steer the parties to her assessment of how the conflict should be resolved.
    - ii) The neutral has no decisionmaking or binding authority.

- iii) The neutral's principal task is to assist the parties in identifying their shared interests with the goal of helping them take action to address their conflict.
- iv) No substantive norms guide the mediation beyond whatever the parties agree upon.
- v) The neutral's actions may be influenced by a number of considerations
  - (1) The stage of conflict development
  - (2) The capabilities of the parties
  - (3) The balance of power between the parties
  - (4) The complexity of the issues involved.
  - (5) Existence of an on-going relationship
- vi) Where there are disparities in power, the mediator may need to intervene as an equalizer.
- vii) Mediation can exacerbate power and capacity imbalances.

c) Uses of mediation in special education proceeding prior to 1997

- i) No explicit provision in the EAHCA/IDEA permitted authorized the use of mediation prior to 1997. However, states were permitted to experiment under U.S. Department of Education regulations.
- ii) A number of states, including Massachusetts and California, established mediation programs in the late 1970's. By 1997, thirty-eight states had mediation programs in place.
  - (1) The Massachusetts and California programs were studied by Linda Singer and Eleanor Nace in 1985. See Linda R. Singer & Eleanor Nace, Mediation in Special Education: Two States' Experiences (1985).
  - (2) The Massachusetts program was established in 1976 as part of the pre-appeals hearing process. In 1985, the Massachusetts State Department of Education employed six employees who were non-attorneys. Mediation was voluntary. Singer & Nace, at 8.
  - (3) California instituted included mediation as part of the California Education Code incorporating the procedural safeguards of the EAHCA. The California process was more structured than Massachusetts'. California law at the time of the study specified time periods for mediation and required mediators to identify issues for resolution at the hearing level in the event the parties failed to come to agreement. Singer & Nace, at 9.
  - (4) Singer and Nace found a fairly high rate of settlement and posited that the existence of a continuing relationship, multi-issue disputes, trained mediators, active advocacy groups and a burdensome alternative to mediation were factors of some weight. Singer & Nace, at 15.
- iii) Peter Kuriloff and Steven Goldberg examined a sampling of special education disputes diverted to mediation before due process hearings in 1987 and 1988 as part of a program sponsored by the New Jersey State Department of Education. See Peter J. Kuriloff & Steven

S. Goldberg, Is Mediation A Fair Way to Resolve Special Education Disputes First?: First Empirical Findings, 2 Harv. Negotiation L. Rev. 35 (1997).

(1) Kuriloff and Goldberg obtained empirical evidence on the parents' perception of fairness of the mediation process. They found that the satisfaction of most parents was lukewarm. Id. at 61.

(2) Kuriloff and Goldberg found that the presence of an attorney advocate had the most significant correlation to parent satisfaction. They suggested that the power imbalances between parents and school districts might not be able to be overcome without outside assistance. Id. at 61-3.

iv) Voluntary mediation under the reauthorized IDEA statute.

(1) Section 1415(e) was inserted into the IDEA requiring states "ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a mediation process . . ." 20 U.S.C. §1415(e)(1) (1997).

(2) The mediation process must be voluntary. 20 U.S.C. §1415(e)(2)(A)(i) (1997).

(3) Mediation must not be used to delay the parent's right to a due process hearing. 20 U.S.C. §1415(e)(2)(A)(ii) (1997).

(4) Mediation must be conducted by a "qualified and impartial mediator who is trained in effective mediation techniques." 20 U.S.C. §1415(e)(2)(A)(iii) (1997)

  (a) Regulations from the U.S. Department of Education have added the requirement that mediators not be an employee of a local education agency or a State agency that is providing direct services to a child who is the subject of mediation. In addition, the individual must not have a "personal or professional conflict of interest." 34 C.F.R. §300.506(c)(1) (1999).

(5) A parent who chooses not to participate in mediation may be required by a school district to meet with a representative of a parent training or alternative dispute resolution agency to encourage the use of mediation and explain its benefits. 20 U.S.C. §1415(e)(2)(B) (1997).

(6) States must bear the exclusive cost of mediation. 20 U.S.C. §1415(e)(2)(D) (1997).

(7) Any agreement reached by the parties must be set forth in writing. 20 U.S.C. §1415(e)(2)(F) (1997).

(8) Any discussions that occur during the mediation process may not be used in subsequent due process hearings or civil proceedings. 20 U.S.C. §1415(e)(2)(G) (1997).

(9) States have the option of authorizing parents to recoup attorneys fees for attorney representatives at mediation. 20 U.S.C. §1415(i)(3)(D)(ii) (1997).

(10) The Senate Committee Report accompanying the reauthorized IDEA stated that "in States where mediation is being used, litigation has been reduced, and parents and schools have resolved their differences amicably, making decisions with the child's best interest in mind." S. Rep. No. 105-17, at 26. The Committee further stated that it was its "strong preference that mediation become the norm for resolving disputes under the IDEA" and that "the availability of mediation will ensure that fewer conflicts will proceed to the next procedural steps, formal due process and litigation, outcomes that the believes should be avoided where possible." Id. at 97.

IV) Concerns About The Use of Mediation in Special Education Disputes

a) Some specific questions—
   i) Can mediation be used in a manner consistent with the goals of the IDEA statute – appropriate education for disabled children and inclusion in the least restrictive environment.
      (1) In mediation, the goal is a settlement acceptable to all parties. The parties need not agree to a settlement that does not comport with statutory guidelines. The important thing is that the parties develop an agreement based upon their own priorities.
      (2) Settlement does not equal a placement in line with the IDEA's goals.
      (3) If the parties' set the norms, what norms will control?
   ii) In the absence of guidance from the statute, how can mediation be made as fair as possible to disabled children and their families?

b) Power imbalances in mediation
   i) Parents are usually at a disadvantage in the special education process in terms of their ability to understand placements and bear the cost of contesting an IEP.
   ii) To balance the relationship, the IDEA enables parents to hire counsel with the hope that, if they prevail, they will recover attorneys' fees. This is not a perfect method, by any means, and many families fail to locate attorneys to assist them in special education disputes.
   iii) The IDEA mediation provision makes the availability of attorneys' fees a state option. New York, for example, has chosen not to permit fee recovery.
   iv) The relationship between parents and school districts is a dependent one. Enforcement of legal rights in such a circumstances is usually linked to the parties' relative power. The weaker party is more likely to compromise unless they have some means of equalizing the power imbalance.
   v) Parents bargain away the right to an impartial hearing and subsequent review as part of agreeing to a negotiated settlement. Those rights were originally instituted to equalize the power balance between the parties.

c) Creating community and the need for conflict
   - i) Mediation alone won't transform a bad parent/district relationship in the absence of a desire by all parties to collaborate in evaluating and placing children.
   - ii) Joel Handler's study of special education in the Madison, Wisconsin school district is instructive. See Joel F. Handler, The Conditions of Discretion: Autonomy, Community, Bureaucracy (1986).
     - (1) The Madison school district encouraged parental input at the referral and evaluation steps of the process through IEP drafting.
     - (2) The district provided parents with handbooks that clearly and thoroughly explained procedural rights.
     - (3) The district made parent advocates available and encouraged their use to assist parents in communicating with the district.
     - (4) Mediation was available as a dispute resolution option in the event of disagreement.
     - (5) Three key features present: close connection between parents and the school district, flexibility in the evaluation approach of the district, and use of outside resources to aid in communication.
     - (6) Mediation was a natural extension of the school district's approach.
   - iii) Many districts do not have the kind of process available in the Madison school district.
     - (1) The IDEA provision does not create these conditions nor does it specify when mediation would be helpful.
     - (2) In such districts, conflict may be necessary in order for the parties to come to a more reasonable position. Where school districts do not empower their parents or consider parent input valuable, voluntary mediation alone will not change the relationship.
     - (3) In the guise of empowering the parties, the IDEA provision may inadvertently make it easier for school districts to win concessions from parents that they normally would not be able to obtain at due process hearings.
     - (4) The possibilities of unfairness are increased because the content of mediated agreements depends almost exclusively on the capacities of the parties.
     - (5) The inherent administrative concerns of school districts over cost and placement options must be balanced by some formalized requirement to justify placements,

d) What's at stake: the case of D.R.
   - i) The experience of parents in D.R. v. East Brunswick Board of Education, 109 F.3d 896 (3rd Cir.), cert. Denied, 522 U.S. 968 (1997), is instructive in demonstrating the stakes involved for parents at mediation.
   - ii) Facts-

(1) In *D.R.*, the parents of a child with cerebral palsy and mental retardation sought to place him in a private residential placement because they believed he was not making sufficient progress in his local school district. The parents and the school district agreed to mediate their dispute while the child attended the residential placement on a trial basis. The parties agreed to a financial settlement for the costs of current and future year expenses and explicitly excluded related service and transportation expenses. Id. at 898-99.

(2) During the course of the school year, the private school concluded that the child needed a one-on-one aide and sent a much higher bill to the parents. The school district refused to pay the additional costs on the basis that these were excluded as related services by the express terms of the parties' agreement. Id. at 899.

(3) D.R.'s parents contested the school district's decision at a hearing before a New Jersey Administrative Law Judge (ALJ). The ALJ dismissed the parents' claims on the basis that the settlement agreement was binding and determinative. The parents then appealed the ALJ's decision to the U.S. District Court for the District of New Jersey, where they prevailed on the basis that circumstances had changes since the parties entered into their agreement. The U.S. Court of Appeals for the Third Circuit disagreed. Id. at 900.

iii) Legal analysis –

(1) In reversing the district court, the Court of Appeals expressed a clear presumption in favor of upholding settlement agreements in the special education context. The court held that D.R.'s parents should not be able to void the agreement based upon a subsequent increase in cost. The court observed that "[a] party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation . . ." and further noted that "[g]overnment entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary purposes." Id. at 900.

(2) The court stated that settlement agreements were to be encouraged as a matter of public policy because they promote "amicable resolution of disputes and lighten the increasing load of litigation faced by courts." Id. Thus, when the parties entered into a voluntary agreement during the course of mediation, they created a binding contract between them. Id.

(3) The court ultimately concluded that the "clear and unambiguous terms" of the settlement agreement prevented increased reimbursement for the additional costs and dismissed the parents' argument that conditions had somehow changed since the agreement was formed. Id.

iv) Concerns in D.R. –

(1) The case demonstrates judicial skepticism of parents attempts to be released from the settlement agreement.

(a) The Court of Appeals assumed a relative level of equality between D.R.'s parents and the school district and further implied that each of the parties was competent to negotiate the terms of their agreement and understood the risks involved. While we do not know if this was necessarily so in D.R.'s circumstance, in general, the relationship between parents and school districts is rarely one of parity.

(b) In order for the results of mediation to be fair, parents must be knowledgeable about what they will be giving up in return for their consent. For parents with ability or the means to obtain advice, this may not present much of a problem. However, Congress' failure to require states to pay for outside assistance at mediation increases the likelihood that less advantaged parents will make agreements without a full understanding of the legal consequences.

(2) Courts will likely not examine the substantive content of mediated agreements.

(a) In concluding that the settlement agreement limited the school district's responsibility for the additional related services, the court never addressed whether one-on-one assistance was educationally necessary in order for D.R.'s private placement to be considered appropriate under the IDEA. The implication of the court's decision is that parties to a mediated settlement can agree to a placement that does not meet the statute's substantive goals.

(b) The dissent in *D.R.* had argued, consistent with the district court, that the IDEA's substantive guarantees of educational assistance could not be bargained away by parents and school districts as part of a settlement. Id. at 902. However, the majority decision in *D.R.* strongly suggests that courts will not intervene as long as a settlement agreement was validly entered into by all parties, even if changed circumstances undermine the appropriateness of the placement.

(c) Thus, the public policy in favor of resolution of disputes trumped the public policy, as expressed in the IDEA, of educating children with disabilities in appropriate placements. This result is troubling given the context of special education disputes and the shortcomings of the 1997 reauthorized statute.

V) Making Mediation More Fair –

a) Give parents access to outside advocacy assistance at voluntary mediation

i) The IDEA statute creates a disparity between due process hearings and voluntary mediation by not providing for attorneys fees at mediation.

ii) The presence of a lawyer may act to mitigate potential power and information imbalances.

iii) Lawyers at mediation may change the character at mediation; however, parents should be given the opportunity to make the choice to obtain assistance if they believe they need it.

b) Strengthen the ability of mediators to address power imbalances.

   i) As written, the states must use "qualified and impartial" mediators trained in "effective mediation techniques" and "knowledgeable in laws and regulations relating to the provision of special education and related services." 20 U.S.C. §1415(e)(2)(A)(iii), (e)(2)(C) (1997). A mediator may not be an employee of a state or local educating agency or have a conflict of interest. 34 C.F.R. §300.506 (1999).

   ii) Mediators should make a determination of a parent's capacity to give voluntary and informed consent at the mediation.

   iii) The mediator should encourage parents to seek the assistance of and obtain information from outside sources, including advocates.

   iv) Mediators should employ a variety of approaches, including facilitative and evaluative techniques.

   v) Mediators should modify mediation procedures, including terminating mediation, when an imbalance of power threatens the ability of the parent to make a voluntary and knowledgeable decision.

   vi) Mediators should be certified to possess a minimal level of proficiency in special education substantive and procedural law, disability awareness and the practical application of special education agreements.

   vii) States should closely monitor mediator selection to ensure the absence of (or appearance of) conflicts of interest.

c) In the event of conflict over the implementation of mediated agreements, courts should review the specific provisions to ensure that placements conform to the IDEA's substantive goals.

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CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT V. GARRET F. AND RELATED SERVICES UNDER IDEA

Question: Whether the definition of "related serviced" in § 1401(a)(17) requires a public school district in a participating state to provide a ventilator-dependent student with certain nursing services during school hours.

The definition of related services under IDEA as it applies to medically fragile students has been the subject of disputes between students and schools since the enactment of the law in 1975. This research examines some of the events that led to the enactment of the Education of All Handicapped Children Act of 1975 (renamed IDEA in 1991) and related services for medically fragile students.

"For all practical purposes, the origin of the federal statute can be traced to three primary sources, case law, state legislation, and public awareness" (Zettel & Weintraub, 1978, p. 10).

> Court decisions affirming the constitutional rights of the handicapped to a public education were undoubtedly a great influence on the development of both State and Federal policies to provide equal educational opportunities to the handicapped. (Fraas, 1986, p.9)

"It was Brown v. Board of Education that most forcefully stated the philosophy of integration" (Rothstein, 1990, p. 2). In 1954, the United States Supreme Court handed down a major decision in Brown v. Board of Education of Topeka, Kansas, a case based on discriminatory practices of the Topeka School System against black children (Riley7, 1978, p. 7). The court said:

> Today, education is perhaps the most important function of state and local governments…It is required in the performance of our most basic public responsibilities. It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (Brown v. Board of Education Topeka, Kansas, 1954, p. 691)

While this case opened the door to an equal education for all students, it also opened the door to the idea of mainstreaming. "The concept of mainstreaming, or educating the handicapped child in the regular classroom as much as possible, paralleled the movement away from racial segregation and helped lead to the determination that separation of children was adverse" (Rothstein, 1990, p. 2). The Court in Brown v. Board of Education of Topeka, Kansas (1954) established equality in education in its concluding statement, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place" (Brown v. Board of Education of Topeka, Kansas, 1954, p. 692).

The application of the principles set forth in the Brown decision to the education of handicapped children became a legal theory in more than 30 separately filed cases throughout the country. Two of these cases culminated in landmark decisions in 1971 and 1972. In Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania and Mills v. Board of Education, a district court approved a consent decree and another district court heard a class action suit that enjoined states from denying education to mentally retarded and handicapped children without due process. PARC firmly established in 1971 the legal right to education for handicapped children. "Thirteen mentally retarded children were represented in this class action suit" (Riley, 1978, p. 7).

The court stated:

> Every retarded person between the ages of six and twenty-one years as of the date of this order and thereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972. (Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 1971, p. 1266).

Turnbull (1981) wrote:

> PARC v. Pennsylvania established the right of all retarded students, however seriously impaired, to a free, appropriate public education; to procedural safeguards in educational placement; and to child find. All handicapped children can learn and therefore, according to this decision, they may not be excluded from public education. Additionally, the stage was set for "least restrictive" placement. (p. 82)

There are a variety of interpretations of related services as defined in IDEA. Osborne (1986) stated:

> The Education of All Handicapped Children Act (EHCA) mandates that public school districts provide handicapped students whatever special education and related services may be needed for an appropriate education. The Act defines related serves [sic] as developmental, corrective, and supportive services that enable a handicapped child to benefit from the special education services outlined in the child's Individualized Education Program (IEP). (p. 421)
>
> The EHCA's related services mandate has been the subject of much litigation, including one case that has reached the U. S. Supreme Court. Thus far the courts have held that the school districts must provide where appropriate the following related services: catheterization, transportation (including transport between the vehicle and buildings), tracheotomy tube insertion, training and counseling for the parents of handicapped students, a temperature controlled environment, extra curricular and recreational activities, and psychotherapy. Most of the legal controversy has involved the exempted medical services portion of the mandate. The courts have held that a service that a nurse or trained layperson can provide is a required health service, whereas a service that must, by law, be performed by a licensed physician is an exempted medical service. (Osborne, 1986, pp. 421-322)

Two difficult questions pursuant to related services were what is appropriate education, and what is the definition of a medical service? "A complete special education evaluation often may include various medical examinations. It is clear from the Act that diagnostic medical assessments are related services and are thus the responsibility of the school district" (Osborne, 1986, P. 424). However, "Related services are required only to the extent necessary for the student to benefit from the special education program. In the case of diagnostic services, including medical assessments, only evaluations necessary to develop an appropriate IEP are required" (Osborne, 1986, p. 425). In a much more complete statement two years later Osborne (1998) wrote:

> The Education of All Handicapped Children Act (EAHCA) mandates that school systems are to provide eligible handicapped children with a free appropriate public education consisting of special education and related services. Under the related services provision school districts have been required to provide supportive and nonacademic services that range from basic transportation to extensive psychotherapy.
>
> The EHCA states the (sic) these services are to be provided when needed "to assist a handicapped child to benefit from special education." However, the EHCA's regulations require that related services need to be provided only to handicapped children who are receiving special education services. If a child is not receiving special education services then that child is not "handicapped" under the EHCA even though that child may have some type of disability.
>
> The EHCA's regulations specifically state that school health services, defined as "services provided by a qualified school nurse or other qualified person," are required related services that must be provided. However, the Act also limits a school district's responsibility to providing only medical services that are for diagnostic and evaluative purposes. (Osborne, p. 935) The only services explicitly excluded from the related services provision of the EHCA are medical services that are not for diagnostic or evaluative purposes.
>
> Since EHCA excludes only medical services from the related services mandate, virtually any service that would allow a handicapped student to benefit from the special education program could be considered a related service. (Osborne, 1985, p. 579)

Wenkart's (1987) definition of medical services stated:

> The federal regulations define medical services as services of a licensed physician. Included in the definition of psychological services are the administering of psychological and educational tests and other assessment procedures; interpreting assessment results; obtaining, integrating, and interpreting information about child behavior and conditions related to learning; consulting with staff members and planning school programs as indicated by psychological tests, interviews, and behavioral evaluations; and planning and managing a program of psychological services, including psychological counseling for children and parents. School health services are defined as services provided by a qualified school nurse or other qualified person. (pp. 113-114)

Other services provided for handicapped children have also been the subject of debate.

"One of the debates among educators over the last several years has been whether public school districts are required to provide catheterization free of charge to students who need it, pursuant to the provisions of

> the Education of All Handicapped Children Act of 1975, (hereinafter referred to as "94-142" or the "Act") or pursuant to Section 504 of the Rehabilitation Act of 1973, (hereinafter referred to as "Section 504")" (Fearen, 1982, p.803).

Fearen (1982) added, "The Courts in both Tatro and Tokarcik held that the public schools had an obligation to catheterize children" (p. 804).

New additions to related services interpretations came from IDEA:

> …the law now includes transition services and assistive technology services as new definitions of special education services which must be included in a child's or youths' IEP. Also, rehabilitation counseling and social work services will be included as related services under the law. Finally, the services and rights under this law are expanded to more fully include children with autism and traumatic brain injury. (Horne, 1991, p. 5)

The Third Circuit addressed the related services issue initially in Tokarcik v. Forest Hills School District, 655 F.2d. 443 (3rd Cir. 1981). The court noted that the list of related services presented in the Act did not included CIC (Clean Intermittent Catheterization), but that the list in the Act was not exhaustive. Since the services of a medical doctor are not required to provide CIC, the court reasoned that CIC could be administered under the umbrella of "school health services." The court added that providing CIC services to a student would advance the mainstreaming concept of the Act.

The Supreme Court faced this issue in a later case and answered the question in a similar fashion. In Irving Independent School District v. Tatro, 104 S.Ct. 3371(1984), The Supreme Court said it must answer the following questions to determine if CIC was a related service to be provided by the school system:

> First, whether CIC is a "supportive servic[e] required to assist a handicapped child to benefit from special education"; and second, where CIC is excluded from this definition as a "medical servic[e]" serving purposes other than diagnosis or evaluation (pp. 3375-3376).

CIC in the Court's opinion "is a 'supportive' service…required to assist a handicapped child to benefit from special education" (p. 3376). The Court adopted the definition of medical services advocated by the court of appeals, " The regulations actually define only those 'medical services' that are owed to handicapped children: 'services provided by a licensed physician' that serve other purposes. This definition of 'medical services' is a reasonable interpretation of congressional intent" (p. 3377).

The Supreme Court placed the following guidelines before the school in providing related services:

> First, to be entitled to related services, a child must be handicapped so as to require special education. Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse could furnish them. Third, the regulations state that school nursing services must be provided only if they can be preformed by a nurse or other qualified person, not if they must be performed by a physician. (Irving Independent School District v. Tatro, p. 3378)

The Supreme Court further defined the term "related services" in its recent ruling in Cedar Rapids Community School District v. Garret F., 119 S.Ct. 992 (1999).

In 1993, Garret's mother requested the District to accept financial responsibility for the health care services that Garret requires during the school day. The District denied the request, believing that it was not legally obligated to provide continuous one-on-one nursing services. (Cedar Rapids Community School District v. Garret F., p. 993)

Garret's mother requested a hearing regarding the resolution of the dispute.

The Administrative Law Judge (ALJ) explained that federal law requires that children with a variety of health impairments be provided with "special education and related services" when their disabilities adversely affect their academic performance, and that such children should be educated to the maximum extent appropriate with children who are not disabled. In addition, the ALJ explained that applicable federal regulations distinguish between "school health services," which are provided by a licensed physician. See 34 CFR §§ 300.16(a), (b)(4), (b)(11) (1998). The district must provide the former, but need not provide the latter (except, of course, those "medical services" that are for diagnostic or evaluation purposes, § 140 (a)(17). According to the ALJ, the distinction in the regulations does not just depend on "the title of the person providing the service", instead, the "medical services" exclusion is limited to services that are "in the special training, knowledge, and judgment of a physician to carry out." (App. To Pet. For Cert. 51a) The ALJ thus concluded that the IDEA required the District to bear responsibility for all of the services in dispute, including continuous nursing services. (Cedar Rapids Community School District v. Garret F. p. 994)

The Federal District Court and the Court of Appeals upheld the ruling by the ALJ. The Supreme Court wrote:

> The Court of Appeals read our opinion in *Irving Independent School Dist. V. Tatro*, 468 U.S. 883 (1984), to provide a two-step analysis of the "related services" definition in § 140 (a)(17) asking first, whether the requested services are included within the phrase "supportive services:"; and second, whether the services are excluded as "medical services." (106 F. 3d., at 824-825) The Court of Appeals succinctly answered both questions in Garret's favor. The Court found the first step plainly satisfied, since Garret cannot attend school unless the requested services are available during the school day. (Id. At 825) As to the second step, the Court reasoned that *Tatro* "established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." Ibid. (Cedar Rapids Community School District v. Garret F., p. 997).

Conclusion of Law:

> This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools. (Cedar Rapids Community School District v. Garret F., p. 997)

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CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT V. GARRET F.

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Brown v. Board of Education

- Equal Educational opportunities for all
- The doctrine of "separate but equal" has no place
- Hence, mainstreaming

Landmark Cases

- Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania
- Mills v. Board of Education

Related Services

- **Whether the requested services are included within the phrase “supportive services”?**

Related Services

- Whether the services are excluded as "medical services"?
  - Diagnostic medical assessments are related services
  - Any service that allows a disabled student to benefit from the special education program

Related Services

- Any service that does not require the services of a licensed physician
- Tokarcik v. Forest Hills School District
- Irving Independent School District v. Tatro

Supreme Court Guidelines for Related Services

- **Student must have a disability that requires special education**
- **Only those services necessary to aid a student with disabilities to benefit from special education**
- **School nurses are mandatory**

Cedar Rapids Community School District v. Garret F.

- **Definition of school health services**
  - Catheterization
  - Continuous nursing services
  - Financial cost of these health services while student is at school
- **Definition of medical services**
  - Special training, knowledge, and judgment of a physician to carry out

Conclusions of Law

- **Meaningful access**
- **The level of education**
- **The school is financially responsible for all related services**

Recommendation

- Employee Nurses
- Employee Aides that are trained as medical assistants

[redacted]

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